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IN THE
# SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1998

JAMES HAYDEN,
*Petitioner*,

v.

CONSOLIDATED RAIL CORPORATION,
*Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Does the Federal Employers' Liability Act protect a railroad worker who sustains a myocardial infarction/heart attack which is objectively and directly related to the railroad's negligence in ordering unsafe work assignments?

2. Is a myocardial infarction/heart attack a physical injury for which suit may be maintained under the Federal Employers' Liability Act?

## LIST OF PARTIES

All parties to the proceedings in the court whose judgment is sought to be reviewed here are named in the caption of the case.

**JAMES HAYDEN,**
*Petitioner,*

**v.**

**CONSOLIDATED RAIL CORPORATION,**
*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI

James Hayden respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

## OPINIONS BELOW

The original panel decision of the United States Court of Appeals for the Sixth Circuit is not officially reported and is reproduced in the Appendix at App. 3a. The Order of the United States Court of Appeals for the Sixth Circuit granting Consolidated Rail Corporation's petition for rehearing, vacating the panel decision and affirming the judgment of the district court is not officially reported and is reproduced at App. 1a. The opinion of the United States District Court for the Northern District of Ohio is not officially reported and is reproduced at App. 10a.

The *en banc* decision of the United States Court of Appeals for the Sixth Circuit in *Szymanski v. Columbia Transportation Co.*, upon which the panel based its order granting the petition for rehearing, vacating the prior decision, and affirming the judgment of the district court is reported at 154 F.3d 591 (6th Cir. 1998) (en banc).

## JURISDICTION

The order of the United States Court of Appeals for the Sixth Circuit granting Respondent's petition for rehearing, vacating the prior panel decision, and affirming the judgment of the district court was entered on was entered on January 13, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

## STATUTE INVOLVED

This case involves the Federal Employers' Liability Act, 45 U.S.C. §51:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or per personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if noon, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees os such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

## STATEMENT OF THE CASE

### A. Proceedings Below

Petitioner James Hayden was a 30 year veteran railroad conductor with the Respondent Consolidated Rail Corporation (hereinafter "Conrail" or the "railroad"), who suffered his third myocardial infarction on June 24, 1992, hours after completing his shift. Prior to June 24, 1992, Mr. Hayden had sustained two on-the-job myocardial infarctions, both of which were well documented and acknowledged by Conrail. Nevertheless, Conrail cleared him to work and, on June 24, 1992, Mr. Hayden suffered his third heart attack, allegedly as the result of Conrail's actions in ordering Mr. Hayden to work an inordinate number of hours over a substantial period of time.

A complaint for personal injury alleging negligence under the Federal Employers' Liability Act, 45 U.S.C. §§51-60, was filed in the United States District Court for the Northern District of Ohio.[1] The railroad ultimately moved for summary judgment on the sole theory that Mr. Hayden's heart attack was not reasonably foreseeable, notwithstanding the railroad's actual knowledge of the two previous myocardial infarctions.

Petitioner opposed the motion with evidence that the railroad's knowledge of his cardiac condition was sufficient to withstand summary judgment. In its Reply Brief, the railroad asserted that this court's decision in *Consolidated Rail Corp. v. Gottshall,* and *Carlisle v. Consolidated Rail*

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[1] The District Court's jurisdiction was based upon 45 U.S.C. §56.

*Corp.*, 512 U.S. 532 (1994), precluded recovery.

The district judge granted the motion, relying on *Gottshall/Carlisle*, as well as its earlier decision in *Szymanski v. Columbia Transp. Co.*, holding essentially that a heart attack by its very nature was an emotional, not a physical injury.

Hayden appealed to the United States Court of Appeals for the Sixth Circuit. The plaintiff in *Szymanski* had also appealed, and the two cases were argued on the same day before the same three judge panel. By 2-1 vote, the panel reversed the district judge in both cases, rendering the more detailed opinion in *Szymanski*.

Both Conrail and the defendant in *Szymanski* filed petitions for rehearing. The *Szymanski* petition was granted and that case was reargued *en banc*. Conrail's petition for rehearing was held in abeyance pending the *en banc* decision in *Szymanski*. On August 31, 1998, *Szymanski* was decided. The *en banc* court rejected the reasoning of the panel majority and the Sixth Circuit *en banc* affirmed the district court. 154 F.3d 591.[2] On January 13, 1999, the three judge panel in the instant case acted on Conrail's petition for rehearing, which had been held in abeyance, granting the petition vacating the prior panel decision and affirming the district court's judgment in light of the *en banc* decision in *Szymanski*. (App. 1a)

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[2] It is understood that Mr. Szymanski's estate elected not to seek certiorari. Petitioner, of course, does seek to have this Court reveiw the significant issues presented.

## B. Statement of Facts

### 1. Introduction

This is an action brought pursuant to the Federal Employers' Liability Act, 45 U.S.C. §51 *et seq.*, to recover compensatory damages for a heart attack (myocardial infarction) sustained by the petitioner, James Hayden, on or about June 24, 1992 and arising out of the course and scope of his employment as a train conductor. As set forth in the Complaint Mr. Hayden had a pre-existing coronary condition which was known to the railroad and,

> 5. Notwithstanding said knowledge, defendant gave plaintiff medical clearance to return to work. For at least a year prior to June 24, 1992 the defendant, with full knowledge of plaintiff's pre-existing heart condition, required plaintiff to work an excessive and inordinate number of hours, and that this work pattern had been in effect for more than the immediate preceding year thereto.
>
> 6. On June 24, 1992, plaintiff suffered a myocardial infarction which was directly and proximately caused by the negligence of the defendant, Consolidated Rail Corporation, in one or more of the following particulars:
>
> A. Knowingly requiring plaintiff to do work which was beyond his physical capacity;
> B. Requiring plaintiff to perform

work which would normally be performed by more than one person;

C. Knowingly permitting plaintiff to continue on a job despite knowledge that the work was beyond his physical capacity;

D. Requiring or permitting plaintiff to continue excessive work assignments despite knowledge that his prior illness had impaired his ability to do the particular job.

Nowhere in the complaint is there any allegation, expressed or implied, purporting to state a claim for negligent infliction of emotional distress. Yet Respondent relied on *Consolidated Rail Corp. v. Gottshall* and *Carlisle v. Consolidated Rail Corp.* 512 U.S.532 (1994), contending that a heart attack caused by excessive work is not a physical injury, but rather an emotional injury. This ultimately, albeit erroneously, became the linchpin of the District Court decision. The plaintiff maintained in the district court and in the court of appeals, and continues to maintain in this Court, that the heart like the shoulder, neck or leg, is a body part capable of being physically abused.

In the district court, Mr. Hayden responded to the railroad's argument by submitting various depositions and affidavits. These evidentiary materials, which were largely unaddressed by the district judge and by the court of appeals, sought to establish that the railroad intentionally and deliberately compelled Mr. Hayden to work more hours on a routine basis than any other conductor in the Dearborn Division, irrespective of how hazardous it may be to any of

its employees and in particular to Mr. Hayden, notwithstanding his known cardiac condition.

2. The Railroad Caused Mr. Hayden's Heart Attack By Deliberately Calling Him to Work an Excessive and Disproportionate Number of Hours

Conrail's position in the courts below has been that under its interpretation of *Gottshall*, it can intentionally assign excessive work to an otherwise healthy man to the point of causing a myocardial infarction, and then claim that the FELA does not afford railroaders protection against heart attacks caused by too much work, theorizing that by its very nature, a myocardial infarction is only a physical manifestation of an emotional injury. The facts, however, belie such a contention, which was adopted by the courts below. In the district court, petitioner presented a number of affidavits, which were **never seriously challenged or rebutted** by Conrail. These affidavits established certain uncontested facts and are summarized as follows:

a. Crew Caller William Brown Intentionally Called Hayden To Work An Excessive Number of Times

At the time of this third heart attack and for some time prior thereto, petitioner had been on the conductor's extra list, which is a rotating pool of conductors who would be called for work assignments as their name rotated or came up on the list.[3] An affidavit (App. 22a) from a crew dispatcher (caller),

[3] When so called, a conductor such as Mr. Hayden has no option to decline the additional assignments. They are mandatory.

William Brown, filed by petitioner in opposition to the railroad's motion for summary judgment, established that trainmen would often use illness or sickness as an excuse to avoid working when called even though they were not, in fact, sick or ill. As a result, it was the practice of the crew callers to take conductors out of their proper rotation and "to always call first those men who we knew would not lie even though we called them a disproportionate number of times."

Petitioner was among those conductors who would be called more often than his appropriate rotation because he would not lie about using illness or sickness as an excuse.

As stated in paragraph 6 of Mr. Brown's affidavit:

> James Hayden was a conductor who I frequently called. The number of calls to him were disproportionate and exceeded the number of calls to most other men. Mr. Hayden would almost never rely upon sickness or illness as an excuse for not making himself available.

Indeed, Mr. Hayden often warned Conrail and told them that the excessive work was going to give him another heart attack, and he continually complained to other crew callers that he was being picked on and continued to remind them of his heart condition. To show just how unreasonable the situation was, Mr. Hayden was called to take a train to Chicago even though he was on vacation.

b. Local Union President Opined that Railroad Intentionally Deviated From Established Procedure

Also submitted in opposition to the motion for

summary judgment was the Affidavit of Robert Tschirret who had been a Conrail employee since 1968 and for fifteen years had been President of Local 2 (formerly Local 550) of the United Transportation Union, to which Mr. Hayden belonged (App. 25a).

It was Mr. Tschirret's experience that Conrail "deviated from the established procedures for calling men such as James Hayden to work out of the Dearborn Division, resulting in some individuals, such as plaintiff, being called an excessive number of times", notwithstanding that Conrail "knew of Mr. Hayden's heart condition as his name was used by example...regarding inadequate manpower and its accompanying dangers and hazards."

Further and of equal importance, it was also Mr. Tschirret's experience that there had been a deliberate depletion in manpower in the Dearborn Division since the early 1980's. This was accomplished by both buy-outs and lay-offs. Yet, by 1990 or 1991, rail traffic had increased, thereby increasing the stress and strain on the men, including Mr. Hayden.

The union repeatedly complained to Conrail about the inadequate number of qualified men in the conductor pool. In fact, with regard to the men who were furloughed or laid-off, Mr. Tschirret demanded, if not begged, for the return to work of these laid off men. Although the railroad presented evidence that it was the union which fought against more men, Mr. Tschirret strongly disagreed. Further, with regard to the laid-off men, Conrail failed to bring these men back until after Mr. Hayden's heart attack of June 24, 1992. It was Mr. Tschirret's opinion, based upon his experience in labor relations and conductor/brakeman safety that:

> . . . the conduct and policy of Consolidated Rail Corporation in permitting the reduction of qualified men available in the conductor/brakeman pools for which James Hayden was employed was at worst a wanton disregard for the health and safety of the conductor/brakemen, such as James Hayden, and, at best, was negligent conduct by Consolidated Rail Corporation.

c. Petitioner's Affidavit Established Excessive Work Schedule

Mr. Hayden submitted an affidavit in which he related a **typical** work week. (App. 31a) For the week selected by Mr. Hayden, January 14 - January 21, 1992, he stated in his affidavit as follows:

> Of the 168 hours in the week, I was bound to the railroad for 112 hours and 25 minutes either on duty, subject to call, traveling to or from the job, or getting required sleep while out of town. That left 55 hours and 35 minutes at home, probably 20-25 of which was sleep time, leaving approximately 30 hours truly free to spend with my family or for myself. Of course, some of that was late at night or early in the morning.

d. Petitioner's Cardiologist Established Causation

Finally, Mr. Hayden's board certified cardiologist reviewed petitioner's affidavit, along with portions of Mr. Hayden's deposition, and other material. Dr. Brownstein's affidavit (App. 37a) expressed his opinion with regard to plaintiff's work regimen as follows:

> 7. Based upon my review of all of the above, it is my opinion that Conrail was negligent in not requiring a modification or reduction of Mr. Hayden's work schedule, and that the work regimen that Mr. Hayden was required to maintain from at least January 1, 1992 to the date of his myocardial infarction of June 24, 1992 was more likely than not a contributing factor to that myocardial infarction.
>
> * * *
>
> 9. It is further my opinion that it was negligent, or not a reasonably safe work practice, to require Mr. Hayden to work the hours he did under the circumstances and in light of his well known cardiological history.

District Judge David A. Katz accepted the railroad's arguments and characterized plaintiff's claim solely as one of emotional distress.[4] He then proceeded to analyze the case in light of *Consolidated Rail Corp. v. Gottshall, supra,* and its companion case, *Carlisle v. Consolidated Rail Corp.,* and concluded that, heart attacks were not compensable physical injuries within the ambit of the FELA, because they are nothing more than physical manifestations of emotional distress. Summary judgment for defendant was accordingly granted.

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[4] As noted, the railroad never addressed the facts set forth in the foregoing affidavits, except to suggest that Mr. Hayden had the seniority to bid on other work, a fact contested by Petitioner. The decision did not turn on that fact, however, as the railroad relied exclusively on *Gottshall*, claiming that the heart attack was an emotional injury.

Plaintiff appealed that decision to the Sixth Circuit Court of Appeals. By a 2-1 vote, the panel reversed the district court decision. (App. 3a) A petition for rehearing filed by Conrail was held in abeyance pending an *en banc* determination by the Sixth Circuit in *Szymanski v. Columbia Transp. Co., supra,* also decided by Judge Katz, and addressing precisely the same issue. *Szymanski* was decided on August 31, 1998, and is reported at 154 F.3d 591 (6th Cir. 1998) on January 13, 1999, the railroad's petition for rehearing was granted, the original panel decision vacated, and the district court judgment affirmed. (App. 1a)

## REASONS FOR GRANTING THE PETITION

### I. THE COURT BELOW GROSSLY MISCHARACTERIZED THIS COURT'S DECISION IN CONSOLIDATED RAIL CORP. V. GOTTSHALL BY ERRONEOUSLY CONCLUDING THAT HEART ATTACKS ARE NOT COMPENSABLE UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT

A heart attack is a physical injury which is compensable under the FELA. Yet, the *en banc* decision of the Sixth Circuit in *Szymanski v. Columbia Transp. Co.,* 154 F.3d 591 (6th Cir. 1998), holding to the contrary, and which forms the basis for the rehearing and affirmance of the district court in this case, has turned the FELA on its head and has sorely done injustice both to the Congressional intent behind the FELA and numerous decisions of this Court. If permitted to stand, the Sixth Circuit's decision will have far-reaching consequences in all future litigation brought under the FELA. By misinterpreting and misapplying this Court's very limited holding in *Gottshall* to a case involving physical injury to Petitioner's heart, an injury which is not within even the most

expansive reading of *Gottshall,* the courts below have creatively changed the face of the FELA by holding as a matter of law that heart attacks are, by their very nature, stress inducted emotional injury and therefore fall under *Gottshall.* Yet in the almost 100 year history of the FELA, this Court has never spoken to whether or not heart attacks are physical injuries which are compensable under FELA.

The question that must be asked is how a myocardial infarction or heart attack can be analogized to a purely emotional claim or mental disturbance. It is submitted that it simply cannot. Yet that is precisely what the Court of Appeals has done in this case.

As Mr. Justice Douglas stated in his oft quoted concurrence in *Wilkerson v. McCarthy*, 336 U.S. 53, 66 (1949), the FELA was enacted in order "to put on the rail industry some of the cost for legs, eyes, arms and lives which it consumes in its operations." This theme has been reiterated time and again by this court. *See, e.g., Urie v. Thompson,* 337 U.S. 163 (1949); *Tiller v. Atlantic Coast Line R. Co.,* 318 U.S. 54 (1943); *Consolidated Rail Corp. v. Gottshall,* 512 U.S. 532 (1994).

This Court has also repeatedly held that because the FELA is remedial in nature, it must be liberally construed to effect its humanitarian purposes. *See, e.g., Urie v. Thompson, supra; Gottshall, supra.* In *Gottshall,* this Court applied these principles by deciding whether "**purely emotional injury** was ... compensable under FELA." 512 U.S. at 541 (emphasis supplied).

Patently, the only issue before this Court in *Gottshall* was the availability of recovery under FELA for a "new category of claims"-negligent infliction of emotional distress.

*Id. Gottshall* and its companion case, *Carlisle v. Consolidated Rail Corp.*, did not purport to address **physical injury,** such as a heart attack. In short, the gravamen of *Gottshall* and *Carlisle* is "emotional harm." *See Metro-North Commuter R.R. Co. v. Buckley,* 521 U.S. 424 (1997). Yet, the Court of Appeals, by applying its decision in *Szymanski* to this case, has transformed a "standard negligence case ... into something [it is] not – [a] negligent infliction of emotional distress claim." *Szymanski,* 154 F.3d at _597 (Moore, J. dissenting)

This case is not and has never been about emotional distress or psychological injury. This is not a case where the plaintiff at any time sought to make Conrail the insurer of his "emotional well being and mental health." *Gottshall,* 512 U.S. at 554. It is about a physical injury to Mr. Hayden's heart muscle caused, in whole or in part, by the negligence of Conrail in compelling Mr. Hayden to work unusual and extraordinary work loads, notwithstanding its actual knowledge of Mr. Hayden's cardiac history.

Such cases have traditionally been accorded recognition under the FELA. Indeed, courts have allowed recovery for heart attacks even in the absence of proof of any other bodily injury. *See, e. g., Williams v. Atlantic Coast Line R. Co.,* 199 F. 2d 744 (5th Cir. 1951); *Miller v. Elgin, J. & E. Ry. Co.,* 177 F.2d 244 (7th Cir. 1949); *Stewart v. Baltimore & O. R. Co.,* 137 F. 2d 527 (2d Cir. 1943). Yet, what the Sixth Circuit has essentially held is that all heart attacks are, by their nature, stress induced, or must be caused by physical impact and, under its interpretation of *Gottshall,* heart attacks are no longer compensable under the FELA, irrespective of the negligence or dangers of the work assignments.

Petitioner respectfully submits that this far exceeds this court's limited holding in *Gottshall*. That this Court intended its decision to reach only to negligent infliction of emotional distress claims is underscored by the Third Circuit's analysis in *Gottshall* on remand. *Gottshall v. Consolidated Rail Corp.*, 56 F.3d 530, 533 (3d. Cir. 1995): "The court found support ... for extending the FELA's coverage to **purely emotional claims**." (emphasis supplied) The Third Circuit went on to define a "purely emotional claim" as "**mental disturbance** unaccompanied by a contemporaneous infliction of physical injury." *Id.*, fn.3 (emphasis supplied)

Additionally, by concluding as a matter of law that Petitioner's heart attack was caused by too much rather than too dangerous work, the court below improperly invaded the province of the jury. The Seventh Amendment to the United States Constitution creates a "federal policy favoring jury decisions of disputed fact questions." *Byrd v. Blue Ridge Rural Elec. Cooperative,* 356 U.S. 525, 538 (1958 ). And this Court has repeatedly held that trial by jury is part of the remedy afforded to injured railroaders under the FELA. *See, e.g., Rogers v. Missouri Pac. R. Co.,* 352 U.S. 500 (1957); *Ellis v. Union Pac. R. Co.,* 329 U.S. 649 (1947); *Tennant v. Peoria & P.U.R.Co.,* 321 U.S. 29 (1944).

Petitioner has not been afforded substantial justice. He has presented a cognizable claim for physical injury under the FELA, but has been deprived of his opportunity to allow a jury to determine the railroad's liability because the Sixth Circuit has misapplied this Court's decision in *Gottshall* to the facts of this case. It is respectfully submitted that this Court grant this petition and define the status of heart attacks under the FELA.

## II. BY ERRONEOUSLY APPLYING GOTTSHALL TO THE FACTS OF THIS CASE, THE SIXTH CIRCUIT HAS UNJUSTIFIABLY LIMITED A RAILROAD EMPLOYEE'S RIGHT TO RECOVER DAMAGES FOR HEART ATTACK BASED ON TRADITIONAL NEGLIGENCE THEORIES

Petitioner respectfully submits that when this Court observed in the *Carlisle* portion of *Gottshall*, that there can be no FELA recovery for "too much" work, only "too dangerous" work, this Court intended that such a principle be applied only in the context of a claim for purely emotional injury premised on a pleaded theory of negligent infliction of emotional distress. In this case, however, Petitioner never pleaded such an injury or such a theory of recovery. Rather, the entire record below established that from the institution of the suit, through the summary judgment process, and in the Court of Appeals, Petitioner contended without deviation or change in theory, that Conrail was negligent in failing to provide sufficient manpower, thus compelling Mr. Hayden to work long and arduous hours, and in assigning him to this type of work regimen despite having actual knowledge of his prior cardiac history, which resulted in reinjury to his heart muscle, **not** to his psyche or emotional well-being.

Simply stating, as the courts below have done, that a heart attack caused by "too much work" is not compensable begs the question of why was there too much work. Petitioner submits that this question should have been, but was not, analyzed by the Court of Appeals in light of the specific theories of negligence pleaded and upon which substantial evidence was presented in the trial court, namely

insufficient manpower and negligent assignment.[5]

As will be shown below, these are traditional FELA negligence theories, where "too much work" can become dangerous. Inasmuch as these traditional theories of recovery are well beyond the scope of this Court's holding in *Gottshall*, however, the Sixth Circuit has effectively negated almost a century of FELA law, since "an employer's failure to provide adequate assistance to its employees can constitute a breach of the employer's duty under the FELA." *Beeber v. Norfolk Southern Corp.*, 754 F. Supp. 1364, 1372 (N.D. Ind. 1990).

**A. Insufficient Manpower**

If a railroad worker injures his back while attempting to move a 1000 pound pipe with an inadequate number of men assisting him, he may recover under the FELA. *Blair v. Baltimore & O. R. Co.*, 323 U.S. 600 (1945). *See also Stone v. New York C. & St. L. R. Co.*, 344 U.S. 407 (1953). In short, injury caused by insufficient manpower is cognizable under the statute.

The evidence adduced in opposition to the motion for summary judgment filed by Conrail established that Conrail had deliberated depleted its manpower in the conductor pool and, as a result of this decrease in the number of qualified available men, Mr. Hayden was called upon more frequently to perform his duties as a conductor. Thus in a typical week, Mr. Hayden worked or was subject to call 112 hours out of

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[5] In this regard, the instant case differs significantly from *Szymanski*, where these elements of negligence were never pleaded or briefed.

168 hours.[6]

Insufficient manpower is an example of how "too much work" can become too dangerous to the point of establishing liability under the FELA, where the minimal requirement for submitting the case to the trier of fact is whether the railroad's negligence played any part, no matter how slight, in producing the injuries complained of. *Rogers, supra*. By way of illustration, if the railroad originally used eight men to carry 1,000 kegs of spikes, each weighing 100 pounds, and then reduced the available manpower to two men, yet expected the same work to be done within a similar period of time, and one of the men became injured as the result of the extraordinary workload, the railroad should not be able to avoid suit under the FELA by claiming the injury was caused by "too much work".

The instant case presents equally compelling evidence of the railroad's negligence in reducing manpower to dangerous proportions. The evidence adduced by petitioner and submitted to the trial court in opposition to the railroad's motion for summary judgment established that Conrail made a conscious and deliberate decision to reduce its work force.[7] Yet, the Sixth Circuit has permitted Conrail to extricate itself from the situation it created by holding that Mr. Hayden's

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[6] When not on duty Mr. Hayden nevertheless had to remain at home lest he miss a call to report to work, thereby subjecting himself to employee discipline.

[7] In this regard, it is fair to infer that from a cost-benefit perspective, it is less costly to pay overtime than to hire new people. By so opting, Conrail apparently made a conscious decision that employee health and safety must yield to such a cost-benefit scenario.

myocardial infarction was emotionally stress induced.

Clearly, if an employee overexerts himself because he is required to do work normally accomplished by more than one person, he may recover for the injury caused by the overwork. *See, e.g., Southern Ry. v. Welch,* 247 F.2d 340 (6th Cir. 1957) (insufficient help made work "harder;" liability sustained). This has been the law since the FELA was enacted. *Gottshall* and *Carlisle* have no application to this theory and to hold, as the Court of Appeals has done, that a myocardial infarction brought on in whole or in part by overwork occasioned by insufficient manpower is not actionable, perverts the beneficent purposes of the Act.

**B. Negligent Assignment.**

Just as it is well established that a railroad employee may recover under the FELA for the negligence of the railroad in failing to provide adequate assistance or manpower, it is equally well settled that where a railroad forces a sick, injured or disabled employee, of whose illness, injury or disability the railroad knew or should have known, into work for which he is not fitted because of his condition, recovery under the FELA may be had. This is commonly referred to as negligent assignment. *Ybarra v. Burlington Northern, Inc.,* 689 F.2d 147 (8th Cir. 1982); *Nutall v. Reading Co.,* 235 F.2d 546 (3d Cir. 1956). At the very least, where an employee's supervisor orders him to perform a task which an employee's physician has said he could not or should not perform because of a pre-existing condition, a jury question on negligent assignment is raised. *See, e.g., Saab v. Norfolk & Portsmouth Belt Line R.R.,* 278 S.E.2d 795 (Va. 1981); *Isgett v. Seaboard Coastline R. R.*, 332 F.Supp. 1127 (D.S.C. 1971). The negligent assignment in this case was requiring a man with known cardiac problems to work more

hours than any other conductor in the Division.

In the leading case of *Fletcher v. Union Pac. R. R.*, 621 F.2d 902 (8th Cir. 1980), *cert. denied*, 449 U.S. 1110 (1981), plaintiff had sustained a back injury and, despite the railroad's knowledge of same, reassigned plaintiff to his old position as a sectionhand. Holding that plaintiff had made a submissible jury question on the negligent assignment theory, the Eighth Circuit stated in pertinent part that "returning Fletcher to work played **a part** in causing his present condition [and] whether the assignment was negligent is a question of fact..." 621 F.2d at 909. (emphasis supplied) *See, also, Dunn v. Conemaugh & Black Lick R.R.*, 267 F.2d 571 (3d Cir. 1957); *Empey v. Grand Trunk Western R.R.*, 710 F. Supp. 653 (W.D. Mich. 1987), *aff'd*, 689 F. 2d 293 (6th Cir. 1989); *Massimiani v. Monongahela R.R.*, 339 F.Supp. 32 (W.D.Pa. 1972); *Knobel v. Pennsylvania R. Co.*, 192 F. Supp. 771 (W.D. Pa. 1961), *aff'd*, 296 F.2d 737 (3d Cir. 1962); *St. Louis-S.F. R. Co. v. King*, 368 P.2d 835 (Okla. 1961).

In the case at bar, the record before the district judge established that Conrail, by and through its medical department, knew of Mr. Hayden's prior cardiac history as early as 1985. There is also record evidence that Mr. Hayden complained to crew caller William Brown and others regarding his cardiac condition.

Clearly, then, the railroad had knowledge of Mr. Hayden's prior cardiac condition, and this knowledge was not confined to the medical department and crew dispatchers but went as high as Conrail's Director of Crew Dispatching, Philip Filippelli. See the affidavit of Robert Tschirret who testified that Conrail was warned about the potential for injury **specifically** to Mr. Hayden. In light of the great body of law

cited herein, there was patently more than sufficient evidence adduced below from which the trier of fact could conclude that it was negligent to compel Mr. Hayden to work the schedule he was forced to maintain. Had plaintiff suffered from a prior back injury and the railroad had assigned to him the task of repeatedly picking up rail ties, the negligence claim would be apparent. It should be no less viable under the facts presented. The heart, like the shoulder, bicep, or back, is a body part capable of being physically abused. Plaintiff alleged and presented substantial, competent , and unrebutted evidence that the railroad excessively assigned him to a job which abused an already compromised cardiac condition. Nowhere in *Gottshall* is there any intimation that negligent assignment, if properly proved, is no longer cognizable under the FELA. The Sixth Circuit's misinterpretation of *Gottshall*, however, foreshadows a death knell to that long recognized theory of FELA negligence.

## III. POST-GOTTSHALL DECISIONS HAVE NOT UNIFORMLY APPLIED AND INTERPRETED THAT DECISION RESULTING IN INCONSISTENT DECISIONS

In the relatively short time since *Gottshall* was decided, a number of state and lower federal courts have grappled with its applicability to stroke or coronary medical conditions. At least two decisions are totally contrary to the result in this case and in *Szymanski*. As stated earlier, in the almost 100 years of the FELA this Court has never addressed the issue of whether heart attacks are physical injuries recognized under the FELA. The emerging conflict may well be eliminated if the court accepts this case.

In *Walsh v. Consolidated Rail Corp.*, 937 F. Supp. 380, *aff'd on reconsideration*, 937 F. Supp. 385 (E.D. Pa.

1997), plaintiff was a conductor like Petitioner herein. The railroad had knowledge of Walsh's hypertensive condition, yet continued to assign him to "stressful jobs ... beyond his physical capacity." 937 F. Supp. at 381. Walsh suffered a stroke and brought suit under the FELA.

Conrail moved for summary without citing *Gottshall*. The motion was denied. Conrail then applied for reconsideration contending *Gottshall* precluded the claim. *Id.* at 386. The motion was again denied, the court observing that "[t] he facts presented in the instant case invoke neither the letter nor the spirit of the Gottshall decision." *Id* at 387. The *Walsh* court continued by noting that:

> Gottshall's instructional value lies largely in claims for negligent infliction of emotional distress which present that same emotional injuries (albeit with physical manifestations) that Carlisle and Gottshall presented.

*Id.*

Likewise, *Gottshall's* applicability to a case involving coronary artery disease was rejected in *Bailey v. Norfolk & W. Ry. Co.*, 1997 WL 124153 (Mo. App., March 18, 1997) (App. 41a). Medical evidence presented in that case established that Bailey, a railroad brakeman, suffered heart problems at least partially as a result of his hours of work and sleep deprivation. Affirming a judgment for the plaintiff, the Missouri court concluded that :

> Bailey's coronary artery disease and gastritis are physical injuries. His claim is one for negligent infliction of a physical injury; not an emotional one. The portions of Gottshall/Carlisle which concern the proper scope of the availability of a claim for

> negligent infliction of emotional distress are inapplicable.

1997 WL 124153 at *6.

To be sure, there are decisions which are contrary to *Walsh* and *Bailey* and which are consistent with the analysis of the Sixth Circuit in *Szymanski*. Yet it cannot be gainsaid the rights, duties and obligations of the parties to an FELA action are governed by uniform federal law. That uniformity and predictability is lacking where a growing number of courts have grappled with the interpretation and applicability of *Gottshall* on fairly analogous facts. This case presents this Court with an ideal opportunity to definitively determine whether a heart attack is a physical injury which is cognizable under the Federal Employers' Liability Act.

## CONCLUSION

For the reasons stated herein, it is respectfully submitted that the petition for a writ of certiorari should be granted.

/s/_____
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## APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed January 13, 1999]

No. 95-3558

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

JAMES HAYDEN, Plaintiff-Appellant,

v.

CONSOLIDATED RAIL CORPORATION, Defendant-Appellee.

## ON PETITION FOR REHEARING

## ORDER

**Before: BOGGS and MOORE, Circuit Judges, and HILLMAN,* District Judge.**

* The Honorable Douglas W. Hillman, United States District Judge for the Western District of Michigan, sitting by

**Per Curiam.** In light of this court's en banc opinion in *Szymanski v. Columbia Transportation Co.*, 154 F.3d 591 (6th Cir. 1998) (eh banc), we grant the petition for rehearing and vacate the prior panel decision. We AFFIRM the judgment of the district court.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

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designation.

## APPENDIX B

## UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed February 27, 1997]

No. 95-3558

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

JAMES HAYDEN,
Plaintiff-Appellant,

v.

CONSOLIDATED RAIL CORPORATION,
Defendant-Appellee.

## OPINION

**BEFORE: BOGGS and MOORE, Circuit Judges, and HILLMAN, District Judge.***

* The Honorable Douglas W. Hillman, United States District Judge for the Western District of Michigan, sitting by designation.

**KAREN NELSON MOORE, Circuit Judge.** Plaintiff-Appellant James Hayden appeals the district court's order granting summary judgment to Defendant-Appellee Consolidated Rail Corporation ("Conrail"). The district court granted summary judgment on the ground that the alleged injuries were workplace stress injuries that are not cognizable under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60, pursuant to the Supreme Court's decision in Consolidated Rail Corp. v. Gottshall, 114 S. Ct. 2396 (1994). For the reasons stated below, we reverse the district court's order granting summary judgment and remand the case to the district court.

## I. BACKGROUND

Hayden began working as a conductor for Conrail in 1963. In 1973, Hayden had a heart attack and was off work for six months. Hayden notified Conrail about the heart attack, and Conrail's doctor authorized Hayden to return to work. In 1975, Hayden suffered a second heart attack or cardiac problem, and again was off work for about six months. Between 1975 and 1992, Hayden was not treated for cardiac problems, and had no restrictions placed on his activities. In 1989, Conrail requested that Hayden have an annual physical examination, but Hayden alleges that Conrail negligently failed to require him to undergo such examinations.

At some point after 1983, Hayden was placed on the "conductor's extra list," a pool of conductors who may be called for work assignments in a rotating order. Conrail called Hayden more often than other conductors because he was experienced and did not make excuses to avoid working. On

June 23, 1992, after a vacation, Hayden returned to work. On June 24, 1992, while off-duty, Hayden had a third heart attack.

Hayden sued Conrail pursuant to the FELA, alleging that Conrail negligently caused his heart attack by requiring him to work an "inordinate and excessive" number of hours. The district court granted Conrail's motion for summary judgment, finding that the gravamen of Hayden's complaint was overwork, and that Hayden's complaint thus was foreclosed by the Supreme Court's decision in Gottshall. Hayden appealed the district court's decision to this court.

## II. THE FELA IN GENERAL

We review the district court's decision granting summary judgment de novo, using the same standards as applied by the district court. Middleton v. Reynolds Metals Co., 963 F.2d 881,882 (6th Cir. 1992). Summary judgment is proper if the evidence submitted shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. City Management Corp. v. U.S. Chemical Co., 43 F.3d 244, 250 (6th Cir. 1994). We consider all facts and inferences drawn therefrom in the fight most favorable to the non-moving party. Id.

The FELA, in 45 U.S.C. § 51, provides that:

> Every common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in [interstate] commerce. . . for such injury or death resulting in whole or in part from the

> negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

To recover damages pursuant to the FELA, a plaintiff must show that he was injured while in the scope of his employment; that his employment was in furtherance of his employer's interstate business; that his employer was negligent; and that the employer's negligence played, some part in causing the injury for which he seeks compensation. Green v. River Terminal Ry, 763 F.2d 805, 808 (6th Cir. 1985). Liability may be imposed only if the harm was reasonably foreseeable by the employer. Id. However, the FELA is to be "liberally construed in favor of the injured plaintiff," and the courts' power to direct verdicts is limited. Id. at 806. Under the FELA, "the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." Rogers v. Missouri Pacific R.R., 352 U.S. 500, 506 (1957).

FELA employers have a duty to use reasonable care to furnish their employees with a safe place to work. Ragsdell v. Southern Pacific Transp. Co.,688 F.2d 1281, 1283 (9th Cir. 1982). Employers also may be negligent if they assign employees tasks that are beyond their physical capacities. Fletcher v. Union Pacific R.R., 621 F.2d 902, 908-09 (9th Cir. 1980), cert. denied, 449 U.S. 1110 (1981). Injuries may be compensable under the FELA even if they are caused by the cumulative effect of a series of incidents. Id. at 909.

## III. HEART ATTACK CLAIMS UNDER THE FELA

In a companion case, Szymanski v. Columbia Transportation Co., No. 95-3205, we have explained in a published opinion our analysis of heart attack claims under the FELA (and also the Jones Act). See Szymanski slip opinion at part III. Our reasoning in Szymanski applies equally here.

Our survey of the caselaw indicates that physical injuries, such as heart attacks, are compensable under the FELA when they are negligently caused by physical stress or by extraordinary non-physical stress. Heart attacks caused by ordinary non-physical workplace stress are not compensable, because such plaintiffs will be unable to prove that their employers were negligent in providing a workplace with ordinary workplace stress. An employer breaches no duty by failing to prevent ordinary workplace stress. To hold an employer liable for the results of ordinary workplace stress would surely make that employer an insurer of its employees' health, a result that we do not believe Congress would intend and that we do not suggest.

In this case, however, the district court erred in believing that Gottshall precludes the possibility of recovery for a heart attack negligently caused by physical stress or extraordinary nonphysical stress. Upon remand, the district court should analyze whether summary judgment is appropriate on Hayden's claim using this standard, i.e., the district court should determine whether Hayden can show a genuine issue that his heart attack at least in part was negligently caused by physical conditions in the workplace or by extraordinary workplace stress. Hayden's complaint asserts that Conrail, which knew of his medical history, assigned him

to work excessive hours in spite of his cardiac problems. The district court must determine whether there is a genuine issue that Conrail negligently subjected Hayden to extraordinary workplace stress, or whether the stress complained of by Hayden was within the realm of ordinary workplace stress and hence not compensable under the FELA.

## IV. CONCLUSION

Because the district court analyzed Hayden's claims using an improper legal standard, we REVERSE the district court's order granting summary judgment to Conrail, and REMAND the case to the district court for further proceedings in accordance with this opinion.

**Hayden v. Consolidated Rail Corporation, No. 95-3558**

**BOGGS, Circuit Judge, dissenting**. For the reasons I have stated in my separate opinion in *Szymanski v. Columbia Transportation Co.,* No. 95-3205, 1997 FED App. 0063P (6th Cir. Feb. 19, 1997), I would also affirm the district court in this case. In Hayden's case, his only complaint is explicitly the number of hours that he had worked, a quintessential case of "too much work." Again, this distinguishes this situation from a case such as *Voytko v. Conrail,* 1996 WL 452934, *1 (6th Cir. Aug. 8, 1996) (unpublished), where even though the ultimate injury may have been emotionally related, the conditions involved were physical and extreme.

Finally, I would affirm the district court in this case for the additional reason that on this record, Hayden cannot prove negligence. He was completely in control of his work situation. He could have rearranged his schedule or taken

another job, but he then would have earned less money (JA 11-12). In light of *Gotthall* and *Carlisle,* I do not see how it is possible for a worker to undertake willingly a job that is acceptable under the union labor agreement, when he need not do so in order to retain his employment, and then complain that the quantity of work has given him a heart attack.

The additional claim of negligence based on the company's failure to administer an annual physical exam, after telling him that they would do so, is insufficient under the conditions of this case when there is no indication that Hayden ever asked for the exam, nor that he forewent any other treatment in reliance upon the Conrail statement. In fact, Hayden had continued to visit his own doctor, and that doctor did not detect any problems or suggest any treatment that would have prevented the heart attack.

I therefore respectfully dissent.

## APPENDIX C

## UNITED STATES DISTRICT COURT
## FOR THE NORTHERN DISTRICT OF OHIO
## WESTERN DIVISION

[Filed May 1, 1995]

Case No. 3:93 CV 7007

JAMES HAYDEN,
Plaintiff,

v.

CONSOLIDATED RAIL CORPORATION,
Defendant.

## MEMORANDUM OPINION

KATZ, J.

This matter comes before the Court for determination on Defendant's motion for summary judgment pursuant to Fed. R. Civ. P. Rule 56. Defendant's motion is supported by a memorandum of law, the pleadings, and various deposition and affidavit testimony. The Court has reviewed the Plaintiff's brief in response to the motion for summary judgment and the briefs of the parties supplemental to the initial briefs each has filed.

## I. FACTUAL BACKGROUND

The facts of this case are relatively uncontroverted. Plaintiff, James Hayden, commenced working for Defendant Consolidated Rail Corporation ("Conrail") in 1963. He sustained a myocardial infarction in 1973, which heart attack was immediately reported to the Defendant. At that time he was off work for six months, after which a doctor retained by Conrail gave Plaintiff a physical and authorized him to return to work. In 1975 Plaintiff had a second heart problem, which was either a heart attack or an artery problem, and again he was off work for approximately six months, after which he was again evaluated and returned to work. At no time between 1975 when the Plaintiff returned to work until June of 1992 was Plaintiff treated regarding his artery or heart condition. No restrictions or limitations were placed upon his employment activities by his physicians or by Conrail physicians after review of reports by Plaintiff's doctors. During that seventeen year period, the only medication which was ordered by physicians to be taken by the Plaintiff was a daily aspirin and daily medication to maintain an acceptable cholesterol level.

In 1983 the Plaintiff relocated to Toledo, Ohio and came under the care of a board certified cardiologist, Pooran Barman, M.D. In 1989, Plaintiff was requested to participate in Conrail's routine physical program and was eventually referred to Conrail's medical director in Dearborn, Michigan. There ensued correspondence between physicians, clearly indicating that Conrail's physician was aware of the Plaintiff's medical history. Dr. Barman corresponded with the medical director of Conrail on August 29, 1989, which letter related the history and current evaluation of the Plaintiff. At that time

Plaintiff was asymptomatic and no medications other than daily aspirin and Lopid were prescribed.

In June 1992 Plaintiff returned from vacation to work on June 23, 1992 and the following day awoke with pains in his arms. Plaintiff was having his third myocardial infarction. Dr. Barman performed a cardiac catheterization which revealed this heart attack.

At the time of this latest heart attack, Plaintiff had been for some time on the conductor's extra list, which is a rotating pool of conductors capable of being called for work assignments as their name came up on the list. It is clear that Plaintiff was called more often than by lot, primarily because of his experience and the fact that he was a willing and able worker who did not propound excuses when he did not feel like going to work.

## II. SUMMARY JUDGMENT STANDARD

As an initial matter, the Court sets forth the relative burdens of the parties once a motion for summary judgment, is made. Summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). Of course, the moving party always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

477 U.S. at 323. The burden then shifts to the nonmoving party who "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) *(quoting* Fed. R. Civ. P. 56(e)).

Once the burden of production has so shifted, the party opposing summary judgment cannot rest on its pleadings or merely reassert its previous allegations. It is not sufficient to "simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather, Rule 56(e) "requires the nonmoving party to go beyond the [unverified] pleadings" and present some type of evidentiary material in support of its position. *Celotex Corp.*, 477 U.S. at 324. Summary judgment shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

## III. ELEMENTS OF NEGLIGENCE ALLEGED BY PLAINTIFF

While there are varying claims of negligence asserted by the Plaintiff, the gravamen of his claims can be reduced to two significant issues. The first and primary issue is Plaintiff's claim that "Defendant, with full knowledge of Plaintiff's pre-existing heart condition, required, Plaintiff to work an excessive and inordinate number of hours, and that this work pattern had been in effect for more than the immediate preceding year." In short, Plaintiff alleges that he was overworked. Additionally, Plaintiff alleges that the

Defendant in the late 1980s articulated a requirement that Plaintiff submit to an annual physical by company physicians, but after the first such physical no additional physicals were given. There is no indication from the record that Plaintiff requested such physicals, that Defendant demanded Plaintiff submit to such annual physicals, or that any such annual physicals would have revealed a condition which would gave required a contraction of Plaintiffs work regimen.

To support its primary allegation of negligence, Plaintiff has asserted that there was a planned reduction in work force which resulted in this Plaintiff, as well as others, having to work more days and hours than reasonably should have been required. With respect to this allegation, there is considerable disagreement between Plaintiffs witnesses and those of the Defendant's, not as to the reduction in work force, but as to the need for additional personnel and the reasons for such reduction.

## IV. FEDERAL EMPLOYER'S LIABILITY ACT

The Federal Employer's Liability Act ("FELA"), 45 U. S. C. § 51 *et seq.*, is a broad remedial statute which is to be construed liberally in order to effectuate its purposes. *Urie v. Thompson,* 337 U. S. 163 (1949); *Green v. River T.R. Co.,* 763 F.2d 805 (6th Cir. 1985). Section 1 of the FELA provides in part:

> Every common carrier by railroad while engaging in [interstate] commerce *** shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce *** resulting in whole or in

part from the negligence of [the carrier]***

Cases abound which evidence the liberal spirit of the Act, and that the law requires only a minimum amount of evidence to establish liability under the FELA. The proof needed to get to a jury in an FELA case is merely whether "employer negligence played any part, even the slightest, in producing the injury." *Cons. Rail Corp. v. Gottshall,* 114 S.Ct. 2396, 2404 (1994), citing *Rogers v. Missouri Pacific R.R.,* 352 U. S. 500, 506 (1957).

As articulated by the Supreme Court, the FELA "does not make the employer the insurer of the safety of his employees while they are on duty, the basis of his liability is his negligence, not the fact that injuries occur." *Id.* It is clear that the traditional common law negligence elements of duty, breach, causation and damages remain applicable. *Moody v. Boston & Main Corp.,* 921 F.2d 1 (1990); *Robert v. Cons. Rail Corp.,* 832 F.2d 3 (lst Cir. 1987).

## V. THE *CARLISLE* CASE

While the Defendant had initially based its summary judgment motion on other issues and cases, it is clear that the case upon which it now relies is the *Carlisle* case, one of the branches in *Conrail v. Gottshall* cited above.

Briefly stated, the *Carlisle* case involved a dispatcher for Conrail who was responsible for the efficient movement of passengers and cargo. There was no doubt that poor equipment and staff reductions made the job extremely taxing and stressful. The record indicated that railroad workers complained on a regular basis about safety problems. In 1988

Carlisle was promoted to train master and given more hours, more responsibilities and incurred resultant stress. He began to experience insomnia, headaches, depression and weight loss. After working a period of weeks in which he put in 12 - 15 hour shifts, he suffered a nervous breakdown. The resultant litigation under the FELA was for negligent infliction of emotional distress. Plaintiff Carlisle asserted that Conrail breached its duty to provide him a safe workplace by forcing him to work under unreasonably stressful conditions, causing his illness.

The Third Circuit affirmed the District Court's ruling permitting such claim to go forward. It concluded that the conditions of the case made it reasonably foreseeable that such unsafe conditions would lead to the Plaintiffs injuries.

The *Gottshall* and *Carlisle* cases were joined before the Supreme Court. The Court reversed the Third Circuit and rejected the foreseeability test it had applied. In its' opinion the Court set forth a new test for emotional distress cases brought under the FELA. The Court noted that Carlisle's injury was "mental or emotional harm (such as fright or anxiety) that is caused by the negligence of another and that is not directly brought about by a physical injury, but that may manifest itself in physical symptoms." *Id.* at 2405. The Court reviewed the common law of negligent infliction of emotional distress and held that the right of recovery for such an injury is limited to Plaintiffs who are within the "zone of danger." The zone of danger test limits recovery to those "who sustain a physical impact as a result of Defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct." *Id.* at 2406.

In its application of the zone of danger test to Carlisle's claim the Court determined that there was **no event or occurrence** which caused Carlisle to sustain physical impact or which placed Carlisle in imminent risk of physical harm. (The core of Carlisle's complaint was that he had been given too much -- not too dangerous work - to do). *Id.* at 2412. The Court ruled:

> We find no support in the common law for the [Third Circuit's] unprecedented holding, which would impose a duty to avoid creating a stressful work environment, and thereby dramatically expand employer's FELA liability to cover the stresses and strains of everyday employment. Indeed, the Third Circuit's ruling would tend to make railroads the insurer's of the emotional well being and mental health of their employees. We have made clear, however, that FELA is not an insurance statute.

*Id.* at 2409.

## VI. APPLICATION OF THE CARLISLE CASE TO PLAINTIFF'S CLAIM

Defendant claims that the *Carlisle* decision is dispositive of the instant case. It perceives that the Plaintiff's claims are for negligent infliction of stress and emotional distress which Plaintiff claims resulted in a third heart attack. Pursuant to the decision in the *Carlisle* case, if it controls, Plaintiff would be barred from recovery because of his exclusion from the zone of danger coverage - there was no

"injury." Hayden does not allege any direct physical impact or imminent threat of physical harm; therefore, according to the Defendant, Plaintiff's claim for emotional distress must fail and Defendant's motion for Summary judgment must be granted.

In addition to relying upon the *Carlisle* case Defendant relies upon this Court's decision in *Szymanski, Administratrix v. Columbia Transportation Co., a division of Oglebay-Norton Co.,* Case No. 3:93 CV 7423, rendered on January 30, 1995, and the decision of the District Court for the Northern District of New York in *Capriotti v. Cons. Rail,* 1995 WL 115712. This case is different from *Szymanski* in that there the Plaintiff's decedent claimed not mental or emotional damage, but rather claimed that the heart attack he experienced was caused by arduous physical labor in combination with general stress. In this case, the Plaintiff alleges that he was merely overworked, which created stress resulting in the heart attack he experienced.

The Eastern District of Pennsylvania was faced with a similar contention in *Dennis v. Cons. Rail Corp.,* 1994 WL 494453 (E.D. Pa. Sept. 7, 1994). In that case the Plaintiff tried to characterize his claim as one for purely physical injury rather than stress and emotional distress leading to the heart attack. The District Court rejected the Plaintiff's contentions, reasoning that the claim was indeed the same as *Carlisle* - a claim for too much, not too dangerous, work.

Similarly, this Court rejects Plaintiff's reasoning and his claim must fail under the *Carlisle* case. There is no claim by the Plaintiff which identifies any condition existing at Conrail which was dangerous? The gravamen of the

Plaintiff's claim is that the cumulative effect of excessive duties and hours of work created a stressful environment which caused the heart attack of which he complains. The core of his complaint is identical to that *of Carlisle:* "That he had been given too much -not too dangerous - work to do." *Carlisle,* at 114 S.Ct. 2412.

Again, Plaintiff asserts that the harm he is claiming is fundamentally different from the harm suffered by Carlisle in that Plaintiff is not claiming mental or emotional harm, but rather is claiming that the heart attack was a physical result of long hours of labor which produced general stress. Plaintiff suffered a heart attack while Carlisle suffered physical manifestations of stress such as nausea, insomnia etc. As this Court stated in *Szymanski,* "although the physical manifestations suffered by Plaintiff may be different from those suffered by Carlisle, the cause and effect is the same. Both men claim to have suffered physical illnesses due to overwork."

The instant case, like the *Carlisle* case, involves "too much - not too dangerous work." The acts of the Defendant in this case are not nearly as egregious as the acts by the Defendant in the *Carlisle* case, and this Court cannot find a distinction from the result in the *Carlisle* case and that which it must reach in this case.[1]

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[1] This conclusion is further supported by the well-reasoned decision of the District Court for Western Division of New York in *Barlette v. Cons. Rail Corp.*, Case No. 92-CV251S, 1994 WL 721342 (WDNY Dec. 6, 1994). In that case, the Plaintiff alleged that Defendant negligently retained and failed to properly supervise his supervisor, who subjected Plaintiff to harassment and

## VII. CONCLUSION

For the reasons set forth above, this Court will grant Defendant's motion for summary judgment.

IT IS SO ORDERED.

/s/_____
DAVID A. KATZ
U.S. DISTRICT JUDGE

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threatened termination of his employment, causing emotional distress with physical manifestations. The Court held that Plaintiff's cause of action did not fall within the zone of danger test enunciated in the *Gotschall* and *Carlisle* cases and, therefore, did not state a cause of action under the FELA.

*District Court Decision, 5/1/95*

**UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF OHIO**
**WESTERN DIVISION**

[Filed May 1, 1995]

Case No. 3:93 CV 7007

JAMES HAYDEN,
Plaintiff,

v.

CONSOLIDATED RAIL CORPORATION,
Defendant.

**JUDGMENT ENTRY**

KATZ, J.

For the reasons stated in the Memorandum Opinion filed contemporaneously with this entry, IT IS HEREBY ORDERED, ADJUDGED and DECREED that Defendant's motion for summary judgment (Doc. No. 20) is granted.

/s/_____
DAVID A. KATZ
U.S. DISTRICT JUDGE

## APPENDIX D

## AFFIDAVIT

**STATE OF OHIO )**
**:ss )**
**COUNTY OF LUCAS )**

I, William Brown, being first duly sworn, depose and state as follows:

1. I am a retired railroad employee. I have been employed by the Consolidated Rail Corporation and its predecessor railroads since 1945 and retired on or about August 1, 1988.

2. For the last twelve (12) years of my employment, I was employed by Consolidated Rail Corporation as a crew dispatcher. My primary duty was to assemble train crews, by telephone, and order them to work.

3. During the twelve (12) years that I was a crew dispatcher for the Consolidated Rail Corporation, virtually all of my employment was at Toledo, Ohio at either the Central Union Terminal or at Stanley Yard. During the years that I was crew dispatcher for Consolidated Rail Corporation it was my experience that the railroad put extensive pressure on myself and all other crew dispatchers working in the Toledo area. It was

my opinion and experience that my supervisors did not care how we managed to assemble the crews as long as the crews were called and assembled. We worked under the threat of penalty if we ever failed to adequately and timely supply the crews that were required.

4. It was extremely common for men to use illness or sickness as an excuse for their unavailability. It was my experience as a crewcaller, that it was the custom and practice of the trainmen to be deceptive and dishonest when called in to work. Many times the same men who would indicate that they were unavailable because of illness or sickness would also confide in me that they were using this explanation as an excuse when they were not actually sick or ill.

5. As a result of the men lying about sickness and illness, it became the practice of myself and other crew callers to always call first those men who we knew would not lie even through we called them a disproportionate number of times.

6. To my knowledge and experience, James Hayden was a conductor who I frequently called. The number of calls to him were disproportionate and exceeded the number of calls to most other men. Mr. Hayden would almost never rely upon sickness or illness as an excuse for not making himself available.

7. I knew from conversations with Mr. Hayden that he had heart problems. He would often tell me that all of this work was going to give him another heart attack. I told him that this was none of my concern; I had a job to do. Further, because his name continued to appear on duty lists, I would call him and he would rarely refuse to accept his work assignments.

8. Many times Mr. Hayden would question as to whether I was "picking on" him because he and a few others were called far more frequently than the typical or average conductor-brakeman in the Toledo area.

9. While I do believe it is a fair statement to say that we did "pick on" Mr. Hayden, we also "picked on" some other individuals whose names I cannot recall at this time.

FURTHER AFFIANT SAYETH NOT.

/s/_____
WILLIAM BROWN

Sworn to before m and subscribed in my presence appeared William Brown this 24th day of January, 1995.

/s/_____
E.J. LEIZERMAN, Attorney at Law

## APPENDIX E

**UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF OHIO**
**WESTERN DIVISION**

Case No. 3:93 CV 7007

| | |
|---|---|
| JAMES HAYDEN,<br>Plaintiff, | ) |
| v. | ) |
| CONSOLIDATED RAIL CORPORATION,<br>Defendant. | ) |

**AFFIDAVIT OF ROBERT TSCHIRRET**

Robert Tschirret, being duly sworn, states as follows:

1. Since March 6, 1968, I have been continuously employed by Consolidated Rail Corporation and its predecessor, Penn Central Railroad, as a road brakeman or road conductor, whose duties and responsibilities are essentially one and the same today.

2. Approximately sixty (60) days after my date of service, I became a member of Local 2 (formerly Local 550) of the United

Transportation Union (UTU) and have remained in good standing to date. During my membership with the United Transportation Union I have served as Parliamentarian, Vice President and President of Local 2 (formerly Local 550). I am currently President and have continuously remained our Local's president for the past fifteen (15) years. I have also served as a delegate to the National Convention of the UTU.

3. As President of Local 2, I have participated in discussions and negotiations with my counterparts within Consolidated Rail Corporation's (hereinafter referred to as Conrail) Dearborn Division such as Phillip Filippelli, who is Director of Crew Dispatchers and his predecessor and their counterparts, in Conrail management regarding manpower and associated issues.

4. As part of our contractual agreements with conrail under the Railway Labor Act, there exists a "Black Book", with which I am familiar, and which sets forth the procedures by which qualified trainmen, such as James Hayden, are called from their assigned pools.

5. It has been my experience that Mr. Filippelli or others within Conrail have deviated from the established procedures for calling such as James Hayden to work out of the Dearborn Division, resulting in some individuals, such

as James Hayden, being called a disproportionate or excessive number of times.

6. I has been my experience that there has been a depletion of conductor/brakeman manpower in the Dearborn Division over the past five (5) to ten (10) years. As far back as the early 1980's, Conrail started a program to buy-out conductor/brakeman jobs, significantly reducing the number of qualified conductors available for the same work, thereby increasing the workload. Yet, by 1990 or 1991, rail traffic increased, thereby increasing the stress and strain on the conductors, such as James Hayden, qualified to work in their respective pools.

7. Further, in the early 1980's, Conrail initiated a program to reduce the work force by furloughing or laying off conductor/brakeman positions. This program eventually resulted in the lay off of approximately 250 men in what is now known as the Dearborn Division. By the late 1980's and early 1990's, it became apparent that these men were desperately needed to relieve the overworking and physical and mental stress of the available conductor/brakeman, such as James Hayden.

8. I have known James Hayden for approximately 75 years, and I have personal knowledge that he was an employee assigned to the Toledo West Extra Conductor Pool/Board.

9. Further, based on my knowledge of the operation of Mr. Hayden's pool, It is my opinion that the railroad's conduct in diminishing the number of qualified conductors in the pool, placed unusual physical and mental stress on our conductors.

10. We have made repeated complaints to Mr. Filippelli and his predecessor about the inadequate number of qualified conductors, such as James Hayden, assigned to the conductor pool.

11. I have been presented with, and have read portions of, the deposition of Philip Filippelli taken in this case on December 28, 1994. I strongly disagree with his contention or testimony that it was the representatives of the UTU who resisted the employment or addition of more men for the conductor pools, such as Mr. Hayden's. Clearly, it was Mr. Filippelli and other representatives of Conrail who refused to hire more men.

17. Further, it is my opinion that because of Conrail's failure or refusal to hire more men in the conductor pool, it was dangerous and hazardous to the health and safety of our men, such as James Hayden.

13. During the negotiating sessions with Mr. Filippelli, his counterparts, or his predecessor, it was my position as well as that of my

colleagues within Local 2 (Local 550) to demand, if not beg, for the return of the men who had been laid off, as referred to in paragraph 7.

14. While Mr. Filippelli acknowledged the need for more men as early as 1990 or 1991, he either deliberately failed to or was not given authority by his superiors to bring these men back until approximately the end of 1992 or the beginning of 1993, clearly after Mr. Hayden's third heart attack.

15. It was the ongoing policy of the union to ask the railroad to call back these laid off men for the sake of the health and safety of the conductors currently working. Conrail consistently refused to do so until well after Mr. Hayden's heart attack in June, 1992.

16. Both the union and myself, as well as Mr. Filippelli's office knew of Mr. Hayden's heart condition as his name was used by example in the course of our discussions and negotiations regarding inadequate manpower and its accompanying dangers and hazards.

17. Based upon my experience and knowledge through my years of employment as a conductor/brakeman and service to my union I consider myself to be an expert on railway management and safety of conductor/brakemen. It is my opinion to a

reasonable degree of probability within my expertise, as are all other opinions expressed herein, that the conduct and policy of Consolidated Rail Corporation in permitting the reduction of qualified men available in the conductor/brakeman pools for which James Hayden was employed, was at worst, a wanton disregard for the health and safety of the conductor/brakemen, such as James Hayden and, at best, was negligent conduct by Consolidated Rail Corporation.

FURTHER AFFIANT SAYETH NOT.

/s/_____
ROBERT TSCHIRRET

Sworn to before me and subscribed in my presence appeared Robert Tschirret this 2nd day of February, 1995.

/s/_____
PATSY E. FERGUSON,
NOTARY PUBLIC

## APPENDIX F

## UNITED STATES DISTRICT COURT
## FOR THE NORTHERN DISTRICT OF OHIO
## WESTERN DIVISION

Case No. 3:93 CV 7007

JAMES HAYDEN,
Plaintiff,

v.

CONSOLIDATED RAIL CORPORATION,
Defendant.

### AFFIDAVIT OF JAMES HAYDEN

James Hayden, being duly sworn, states as follows:

1. I am the plaintiff in the within action and have personal knowledge of the facts contained herein.

2. When my deposition was taken on June 24, 1993, I did not have my time book with me. I did have a chart that I had prepared from my time book which was marked as a deposition exhibit.

3. In this chart, I attempted to show hours on duty and off duty over a period of time. I believe there was some confusion regarding my verbal explanation of the chart and, therefore, I submit the following written narrative of a typical work week in the months just preceding my heart attack of June 24, 1992.

4. I have chosen the week of January 14, 1992 through January 21, 1992 as being representative of the type of work schedule I had to contend with. Some weeks were not as bad; some were worse. The information which follows is taken directly from the notations I made in my time book contemporaneously with the events stated. My time book is available for the court's inspection should it so desire:

On January 14, 1992 I was called at home at 7:00 p.m. I traveled to Central Union Terminal in Toledo, Ohio and went on duty at 9:00 p.m., taking train number TOEL 4 to Elkhart, Indiana. I was off duty in Elkhart at 6:00 a.m. on January 15, 1992 and arrived at my motel in Elkhart at 7:30 a.m. (Typically it takes one and one-half hours from the time I go off duty in Elkhart to the time I check into the motel). At that time, I would have gone to sleep in my motel room.

On January 15, 1992, I was subject to call in Elkhart at 12:00 noon and thus, I had to remain in or

around my motel room. I was actually called at 8:35 p.m. at went on duty in Elkhart at 10:35 p.m., taking train number ELCO 5 to Toledo, Ohio. I was off duty in Toledo at 6:45 a.m. on January 16, 1992 and returned home and went to sleep. Typically, it would have taken me 45 minutes to washup, check out and drive home.

I was subject to call on January 16, 1992 at 12:45 p.m. and, accordingly, remained at home until I was called at 8:35 p.m., going on duty at Central Union Terminal at 10:35 p.m. on January 16, 1992, to take train number TV 79 to Elkhart.

I was off duty in Elkhart at 2:45 a.m. on January 17, 1992, went to my motel, slept for about six hours, and was subject to call at 8:45 a.m. on January 17, 1992. I remained in the motel until I was actually called in Elkhart at 5:00 p.m. on January 17, 1992, going on duty at 7..00 p.m. for train number CJSA 7, to Toledo.

I was off duty in Toledo at 11:30 p.m. on January 17, 1992 and got home at approximately midnight. I saw my wife briefly and went to sleep. I was subject to call at 5:30 a.m. on January 18, 1992 and accordingly stayed home all day until I was called at 6:00 p.m. to go on duty at Central Union Terminal at 8:00 p.m. to take train number BUEL 8 to Elkhart.

I was off duty in Elkhart at 12:45 a.m. on January 19, 1992. Upon my arrival in Elkhart, I was told to take four hours off and be prepared to go back

on duty at 4:45 a.m. on January 19, 1992 to take train number ELPI 9X to Toledo, arriving in Toledo at 9:45 a.m.

I was off duty in Toledo at 9:45 a.m. on January 19, 1992 cleaned up, checked out and went home, arriving at approximately 10:30 a.m. and slept approximately 4-5 hours before being subject to mandatory availability at 3:45 p.m. on January 19, 1992. I was called at 6:00 p.m. on January going on duty at 8:00 p.m. for train number OIEL 8 to Elkhart.

I was off duty in Elkhart at 2:00 a.m. on January 20, 1992 and subject to call at 8:00 a.m. on January 20, 1992. I was called at 6:00 p.m., going on duty at 8:00 p.m. on January 20, 1992 for train number PXPI 9 to Toledo. I went off duty in Toledo at 4:00 a.m. on January 21, 1992.

Of the 168 hours in the week, I was bound to the railroad for 112 hours and 75 minutes either on duty, subject to call, traveling to or from the job, or getting required sleep while out of town. That left 55 hours and 35 minutes at home, probably 20-25 of which was sleep time, leaving approximately 30 hours truly free to spend with my family or for myself. Of course, some of that was late at night or early in the morning.

5. My attorney, E. J. Leizerman, has provided me with a copy of the Affidavit of William Brown dated January 23, 1995, which I have read.

6. Although I know that Mr. Brown retired in 1989, I can state that the operations of Conrail or its crew callers never really changed from that date until the date of my heart attack in 1992.

7. During the years 1991 and 1992 up to the time of my heart attack, I continued to complain to the various dispatchers who would call me, that they were picking on me and asked why were they always calling me?

8. I also voiced my concerns to them about my cardiac condition, as I had done with Mr. Brown as he has indicated in his Affidavit.

9. The most common response I would get from the crew callers was that unless I was prepared to tell them I was sick or ill, they would continue to call me.

10. In fact, to give but one example of the frequency in which I was called, during my vacation in June, 1992, just prior to my last heart attack, I received a call at home to take a train to Chicago. The crew caller told me that they called me because they had no qualified people available at that time.

11. It was well known to me that through attrition and buy-outs, Conrail had a shortage of available and qualified conductors. Had more men been available, I would not have been

subjected to the type of schedule shown above.

FURTHER AFFIANT SAYETH NOT.

/s/_____
JAMES HAYDEN

Sworn to before me and subscribed in my presence appeared James Hayden this 30th day of January, 1995.

/s/_____
PATSY E. FERGUSON
Notary Public

## APPENDIX G

**UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF OHIO**
**WESTERN DIVISION**

Case No. 3:93 CV 7007

| | |
|---|---|
| JAMES HAYDEN, | ) |
| Plaintiff, | ) |
| | ) |
| v. | ) |
| | ) |
| CONSOLIDATED RAIL CORPORATION, | ) |
| Defendant. | ) |

**AFFIDAVIT OF SHELDON L. BROWNSTEIN, M.D.**

Sheldon L. Brownstein, M.D., being duly sworn states as follows:

1. I am a Board Certified Cardiologist, licensed to practice medicine in the State of Ohio. I have been James Hayden's treating Cardiologist since June 26, 1992.

2. I have reviewed and relied upon to the history which I took from Mr. Hayden, as well as portions of his deposition of June 24, 1993,

Mr. Hayden's Affidavit of January 30, 1995, and portions of the deposition of Taras Nowosiwsky, M.D. taken on January 4, 1995, in addition to portions of Mr. Hayden's medical records.

3. On or about June 24, 1992, prior to my seeing Mr. Hayden, he had developed an enzymatic myocardial infarction, and further testing demonstrated that his injection fraction was 25%.

4. A subsequent electrophysiology study demonstrated that Mr. Hayden had a very rapid ventricular tachycardia which was refractory to medication. Accordingly, on July 7, 1992, Mr. Hayden underwent implantation of an automatic cardioverter defibrillator for the purpose of protecting him from dizzy spells and possible sudden cardiac death.

5. In the history that was given to me by Mr. Hayden, he stated that he was a brakeman/conductor for Consolidated Rail Corporation, and that he had been required to report to work on an extremely frequent basis between January 1, 1992 and June 24, 1992.

6. I was also aware, based upon the history given to me by Mr. Hayden, that he had a pre-existing coronary condition prior to the myocardial infarction of June 24, 1992, with past episodes of myocardial infarctions (heart

attacks). This history clearly was known to Mr. Hayden's employer, Consolidated Rail Corporation.

7. Based upon my review of all of the above, it is my opinion that Conrail was negligent in not requiring a modification or reduction of Mr. Hayden's work schedule, and that the work regimen that Mr. Hayden was required to maintain from at least January 1, 1992 to the date of his myocardial infarction of June 24, 1992 was more likely than not a contributing factor to that myocardial infarction.

8. It is further my opinion that the myocardial infarction of June, 1992 was a direct proximate cause or need for the permanent surgical implantation of a internal cardioverter defibrillator.

9. it is further my opinion that it was negligent, or not a reasonably safe work practice, to require Mr. Hayden to work the hours he did under the circumstances and in light of his well known cardiological history.

10. I also note in reading the deposition of Dr. Nowosiwsky that although initially Conrail wanted Mr. Hayden to undergo annual medical examinations (as opposed to the normal three year examination), Conrail failed to follow up on that and failed to require Mr. Hayden to undergo annual examinations after 1989. It Is

my opinion that given Mr. Hayden's history of pre-existing myocardial infarctions and a 35% ejection fraction the Consolidated Rail Corporation medical department committed an unsafe or negligent work practice in not requiring or providing annual examinations by a physician familiar with both Mr. Hayden's medical history and the specific job demands of the particular employee.

11. It is my opinion that the failure to give an annual examination by a physician familiar with both Mr. Hayden's medical history and his specific job demands fell beneath reasonable acceptable medical standard given the Conrail medical department's prior knowledge of Mr. Hayden's medical history.

12. All of the opinions expressed herein are stated to a reasonable degree of medical probability.

FURTHER AFFIANT SAYETH NOT.

/s/_____
Sheldon L. Brownstein, M.D.

Sworn to before me and subscribed in my presence appeared Sheldon L. Brownstein, M.D. this 31st day of January, 1995.

/s/_____
E.J. Leizerman, Attorney at Law

## APPENDIX H

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. IT MAY BE SUBJECT TO A MOTION FOR REHEARING OR TRANSFER. IT MAY BE MODIFIED, SUPERSEDED OR WITHDRAWN.

**JAMIE BAILEY, Plaintiff-Respondent,**
**v.**
**NORFOLK AND WESTERN RAILWAY COMPANY, Defendant-Appellant.**

**No. 70194**

COURT OF APPEALS OF MISSOURI,
EASTERN DISTRICT, DIVISION FOUR

March 18, 1997

Appeal from the Circuit Court of the City of St. Louis. Hon. Julian L. Bush.

KAROHL, Judge

*1 Former employer, Norfolk and Western Railway Company (N & W), appeals from: (1) a judgment granting former employee, Jamie Bailey (Bailey), $404,475 on his claim under the Federal Employers' Liability Act (FELA) 45 U.S.C. §§ 51-60, for damages for coronary artery disease and gastritis allegedly caused by N & W's negligence; and, (2) an order overruling its Motion for Judgment Notwithstanding the

Verdict, or Remittitur, or in the Alternative, Motion for a New Trial.

## FACTS

Bailey worked as an "over-the-road" brakeman for N & W from 1962 until 1990. Bailey would ride on the train from one rail yard to another, and perform many tasks to keep the train running. One of his duties was to make repairs when necessary. The work of a brakeman is hard work.

Bailey was an on-call worker. He was subject to be called in, "24 hours a day, 7 days a week, 365 days out of the year." The on-call nature of his job resulted in a very erratic work schedule. He would sometimes work in the morning, other times in the evening and still other times in the middle of the night. It was very difficult to anticipate when he would be called for his next shift. He testified that as a result of his unpredictable work schedule, "I couldn't get rest. I didn't know when to go to sleep, or when to get up, I couldn't, I just couldn't get any rest."

Bailey's difficulty in getting adequate rest was exacerbated by the away-from-home sleeping dormitory provided by N & W at its North Kansas City yard. Other employees of N & W testified the dormitory was not a good place to get sleep. The dormitory was too noisy, the temperature too hot or too cold and the lighting too bright.

The walls of the dormitory were not well insulated against noise. The dormitory was less than 40 feet away from refueling tracks where engines were switched and cars banged. Also, the sound of trains traveling 25 miles an hour

along the nearby mainline tracks could be heard within the dormitory. The yard received a lot of outside traffic. The noise of grocery and trash trucks would crash through the dormitory. The sounds of employees working in the yard with jack hammers and other maintenance equipment could be heard within the dormitory. One employee testified, "the sound went completely through the dormitory. . . . like you['re] walking down the street and walking by somebody with a jack hammer." Many noises coming from within the dormitory would also disrupt the sleep of employees including: a "tremendous banging noise" from the climate control system, knocks on doors for employees who were called back to work and scraping noises of beds being moved by cleaning personnel.

The lack of adequate climate control in the dormitory also disrupted employees' sleep. The manager of the dormitory testified, "for a long time the thermostat control was kept locked up and we couldn't get [to] it to control it." The vent covers were regularly broken or missing. In the summer, the air conditioning ran constantly, cooling the rooms so much employees would have to open windows to warm the rooms, letting in all the outside noise. In the winter, the rooms near the boilers would have floor temperatures of up to 95.7 degrees and the rooms further away would get so cold that on one occasion ice formed on an inside wall.

*2 The lighting in the dormitory also disrupted sleep. It was difficult to create a dark sleeping environment when attempting to rest during daylight hours. According to Bailey, "half the rooms didn't have curtains."

N & W had notice that the dormitory was not conducive to

sleep. The manager of the dormitory received several complaints about the sleeping conditions. She relayed these complaints to her supervisors.

The Railway Labor Executive Association (RLEA) represents railroad workers before Congress, the Interstate Commerce Commission and the Federal Railroad Administration (FRA). In 1974, RLEA filed a petition with FRA requesting sleeping facilities be moved away from the yards where railroad switching occurs because the noise prevented railroad workers from receiving adequate rest. In 1976, Congress amended the Hours of Service Act making it unlawful for a railroad to provided away-from-home employee lodging which does not provide a meaningful opportunity for rest free from interruptions caused by noise under the control of the railroad. See 45 U.S.C. § 62(a)(3)(1976).

N & W also had constructive notice that inadequate rest could cause health problems. One of N & W's experts agreed with the proposition that "shift work, shift variability and sleep deprivation over long periods of time endured chronically, may contribute to the formation of coronary artery disease." The same expert also conceded that information on the possible health consequences of inadequate rest has been available to the railroad industry for a long time.

Bailey was diagnosed with ulcers in 1982 or 1983. In June 1989, he was diagnosed with coronary artery disease. He underwent an angioplasty to open a blockage in excess of 90% on the right side of his heart. In April 1990, Bailey retired from N & W because of his heart and stomach conditions. Since 1989, Bailey has been diagnosed with four other blockages in his heart and arteries.

At trial, four medical experts opined that Bailey's physical injuries were partially caused by his hours of work and his deprivation of sleep over his 28-year career. One doctor testified:

> the body has an internal clock, a very powerful clock, circadian clock which dictates the time of day in which you are maximally alert for sleeping. . . . So this biological clock, we've learned more recently, is the reason why shift workers have so much difficulty. The biological clock intends, if we can say it that way, for you to be awake during the day and at sleep at night. When that isn't the case, then there is physiological consequences.

He also identified two health consequences resulting from the disruption of the circadian clock: "The first is gastrointestinal disease, most prominent there is ulcers, stomach ulcers. The second is cardiovascular problems; angina, heart attacks, heart pains . . ." and coronary artery occlusion. He concluded that Bailey's work schedule and dormitory sleeping environment provided to him during his 28-year career, contributed to the cause of his gastritis and his coronary artery disease.

## DISCUSSION

*3 In its first point, N & W argues the trial court erred in overruling its motions for directed verdict because Bailey had failed to make a submissible case under FELA for heart disease and gastritis. It contends Bailey failed to make a submissible case because he failed to meet the United States Supreme Court's "zone of danger" test.

Section 1 of FELA provides that "every common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." 45 U.S.C. § 51.

N & W argues the United States Supreme Court in Consolidated Rail Corp. v. Gottshall and Carlisle, 512 U.S. 532, 114 S. Ct. 2396, 129 L. Ed. 2d 427 (1994), held that claims like Bailey's are not cognizable under FELA. N & W's argument appears to rely on one of two propositions; either: (1) Gottshall/Carlisle's "zone of danger" test limits recovery under FELA for any kind of injury, even purely physical ones, to employees "who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct." 114 S. Ct. at 2406; or, (2) Bailey's claim is a work-related-stress claim and such claims, even if they involve purely physical injuries, are not cognizable because Bailey did not suffer his injuries while he was within the "zone of danger."

To the extent N & W's argument relies on the first proposition, it misstates the Gottshall/Carlisle decision. Gottshall/Carlisle does not stand for the proposition that only claims for injuries, physical or otherwise, that are caused by physical impact or the threat of imminent physical harm are cognizable under FELA. The issue in Gottshall/Carlisle was "the proper standard for evaluating claims for negligent infliction of emotional distress that are brought under the Federal Employers' Liability Act." 114 S. Ct. at 2400. The Court held "that claims for damages for negligent infliction of emotional distress are cognizable under FELA." 114 S. Ct. at

2407. However, it limited the scope of recovery for negligently inflicted emotional distress under FELA to emotional injuries, and related physical manifestations of the emotional injuries, caused by a physical impact or the threat of imminent physical harm. 114 S. Ct. at 2410-2411. The Federal common law "zone of danger" test adopted by the Gottshall/Carlisle Court was designed to limit the scope of recovery for claims of negligent infliction of emotional distress under FELA, and not for all FELA claims.

N & W's argument also appears to rely on the proposition that Bailey's claim is a work-related-stress claim and such claims are not cognizable under FELA. N & W relies on dicta in Gottshall/Carlisle where the Court considered the claim of Alan Carlisle. Carlisle was a trainmaster for Consolidated Rail Corp. (Conrail). Reductions in staff required Carlisle to take on additional duties and work long and erratic hours. As a result Carlisle experienced insomnia, headaches, depression, weight loss and eventually a nervous breakdown. Carlisle sued Conrail for negligent infliction of emotional distress under FELA. 114 S. Ct. at 2402. The Supreme Court held:

> ***4** Carlisle's work-stress-related claim plainly does not fall within the common law's conception of the zone of danger, and Carlisle makes no argument that it does. Without any support in the common law for such a claim, we will not take the radical step of reading FELA as compensating for stress arising in the ordinary course of employment. In short, the core of Carlisle's complaint was that he "had been given too much--not too dangerous--work to do. That is not our idea of an FELA claim." Lancaster v. Norfolk and Western Railway Company, 773 F.2d 807, 813.

Id. at 2411-2412. (Our emphasis.)

N & W would extend this dicta to preclude claims for injuries, even physical ones, which are based on a stressful work schedule. Bailey argues this dicta should not be interpreted or construed in isolation. He argues in his brief:

> it is clear that the Gottshall Court's plain intendment in granting certiorari in the cases below was to resolve the issue regarding the standard for cognizability of F.E.L.A. claims for negligent infliction of emotional distress. . . . When further considering the factual context presented in the Gottshall and Carlisle cases, it is clear that the "stress" alleged by those plaintiffs was emotional distress. . . . With the foregoing in mind, it is simply absurd to pull the above-quoted "work-related stress" language from the Gottshall decision and attempt to construe it separate and apart from the entire context of the case, which focuses on emotional injury.

There are cases which have interpreted Gottshall/Carlisle as precluding such work-related-stress claims involving heart diseases. See Dennis v. Consolidated Rail Corp., 1994 WL 494453 (E.D. Pa.); Capriotti v. Consolidated Rail Corp., 878 F. Supp. 429 (N.D. N.Y. 1995); Keith v. Consolidated Rail Corp., U.S.Dist.Ct., E.D. of Michigan, Southern Division, No. 95-CV-70216 (June 18, 1996). [FN1]

Even Bailey's authority, Walsh v. Consolidated Rail Corp., 937 F. Supp. 380 (E.D. Pa. 1996), acknowledges,

> [w]hile Gottshall purportedly limits the class of potential claimants of negligent infliction of emotional distress to those who actually fall within the relevant

> zone of danger, several courts have relied on this decision when refusing to recognize a cause of action under FELA to compensate for stress arising in the ordinary course of employment.

Id. at 388. The Walsh court held, "FELA does not provide relief for victims of routine, job related stress . . .." Id. at 389.

The plaintiff in Walsh filed a complaint against Conrail under FELA, alleging that the railroad's negligence caused him to suffer a stroke. Id. at 382. Walsh argued, "Conrail inadequately staffed its operations, resulting in a more strenuous work schedule; contracted with physicians who failed to properly evaluate and treat his hypertension; and required him to perform work beyond his capacity and aggravated his hypertension, a known disability." Id. at 383.

*5 The Walsh court first examined whether Walsh's injury was emotional or physical. It held, "Gottshall's instructional value lies largely in claims for negligent infliction of emotional distress which present the same emotional injuries (albeit with physical manifestations) that Carlisle and Gottshall presented." 937 F. Supp. at 387. The court determined,

> Walsh presents a claim for negligent infliction of a physical injury completely distinct from the emotional and mental injuries addressed in Gottshall. . . . Walsh does not assert that Conrail's negligence caused a mental or emotional injury which then manifested itself through physical symptoms, . . . . Indeed, his case does not contain any "emotional" component: notably absent from Walsh's Complaint is any mention

> of emotional injury.

Id. at 387-388. (Our emphasis.)

Similarly here, Bailey's alleged injuries, heart disease and gastritis, were purely physical. His medical experts testified his heart disease and gastritis were, in part, caused by the inadequate sleeping facilities negligently maintained by N & W. They testified N & W's inadequate sleeping facilities caused Bailey's sleep deprivation and disrupted his "circadian rhythms", a physiological and not a mental or an emotional process, which ultimately caused his heart disease and gastritis.

The Walsh court found support for its decision to distinguish Walsh's claims from the emotional injuries discussed in Gottshall/Carlisle from the policy considerations discussed in that Supreme Court decision. The Gottshall/Carlisle Court noted several policy considerations supported its imposition of the "zone of danger" test for FELA claims of negligent infliction of emotional distress. It observed that many of these policy considerations were "based on the fundamental differences between emotional and physical injuries." Gottshall/Carlisle, 114 S. Ct. at 2405. It also observed,

> [b]ecause [all of the causes] of emotional disturbance [are] usually not as readily apparent as that of a broken bone . . . [the] recognition of a cause of action for [emotional] injury when not related to any physical trauma may inundate judicial resources with a flood of relatively trivial claims, many of which may be imagined or falsified, and that liability may be imposed for highly remote consequences of a negligent act.

Id. citing Maloney v. Conroy, 208 Conn. 392, 397-398, 545

A.2d 1059, 1061 (1988). The Court found the possibility of the absence of finite limits on the number of persons who might suffer emotional injury as a result of a given negligent act, particularly significant. Id. The Walsh court held that the Supreme Court's concerns were not relevant to this claim because of the certainty and predictability of the physical injury alleged. Walsh, 937 F. Supp. at 388.

We also review a case where the Supreme Court's concerns are inapplicable. Bailey's physical injuries were certain and predictable. Allowing Bailey's claim would not result in unlimited liability. Only a finite number of persons could pursue claims that an inadequate sleeping facility, negligently maintained by their employer, disrupted their circadian rhythms resulting in coronary artery disease and gastritis.

***6** Bailey's coronary artery disease and gastritis are physical injuries. His claim is one for negligent infliction of a physical injury; not an emotional one. The portions of Gottshall/Carlisle which concern the proper scope of the availability of a claim for negligent infliction of emotional distress are inapplicable.

Some courts have relied on the Gottshall/Carlisle dicta to preclude all FELA work-related-stress claims. "In refusing to entertain claims which assert nothing more than job related stress, Gottshall and its progeny draw a distinction between FELA claims alleging that the railroad assigned 'too much' work and those alleging that the railroad assigned work that was 'too dangerous.'" Walsh 937 F. Supp. at 389.

In Capriotti v. Consolidated Rail Corp., 878 F. Supp. 429 (N.D. N.Y. 1995), the court refused to recognize a claim that

alleged the cumulative effect of the employee's "duties and responsibilities and the long hours of work created a stressful environment which caused his injury." Id. at 433. The court held that kind of claim is identical to Carlisle's: "'that he had be [sic] given too much--not too dangerous--work to do.'" Id. citing Gottshall/Carlisle, 114 S. Ct. at 2412. The court noted that the employee had "not identified any particular condition existing at Conrail that was dangerous." Capriotti, 878 F. Supp. at 433. Bailey did not allege or try a claim, based on stress as the cause of his physical injuries.

The Walsh court observed, in the cases after Gottshall/Carlisle that fell on the "too dangerous" side of the equation, the employees identified a particular, discrete condition of their employment that made their jobs "too dangerous." Walsh, 937 F. Supp. at 389. In Walsh, the particular and discrete condition that made his job "too dangerous" was the misdiagnosis and treatment of his hypertension. Id. Here, the particular and discrete condition that made Bailey's job "too dangerous" was the inadequately maintained sleeping facilities.

Bailey's claim is cognizable under FELA. The Gottshall/Carlisle Court's "zone of danger" test is not a prohibition because Bailey's claim is not for negligent infliction of emotional distress, nor is it merely a negligent failure to provide a stress-free work environment claim. His claim is for a failure to exercise reasonable care in providing a reasonably safe place to work and reasonable conditions in which to work where the railroad had notice of the hazardous conditions in the dormitory. Lodging accommodations provided by the railroad for its employees are work conditions. See Empey v. Grand Trunk Western Railroad

Co., 869 F.2d 293 (6th Cir. 1989); Carney v. Pittsburgh & Lake Erie Railroad Co., 316 F.2d 277 (3rd Cir. 1963); and Mostyn v. Delaware, L.& W. R. Co., 160 F.2d 15 (2nd Cir. 1947). The duty to provide reasonably safe conditions is a traditional and recognized one under FELA. Walsh, 937 F. Supp. at 390. Bailey presented evidence which supported findings that N & W breached its duty. He was an on-call employee who stayed overnight in an in-yard dormitory owned and inadequately maintained, by N & W.

> *7 [W]here [the railroad] has breached . . . [a] traditional and recognized duty, and a nexus exists between the breach and the resulting injury, a FELA claim exists so long as [the railroad's] breach played even a slight role in causing the physical injury. This remains true even if the stress of general working conditions acts in concert with [the railroad's] breach and plays an intervening and contributory role, albeit a minor one, in producing the injury.

Walsh, 937 F. Supp. at 390. Point denied.

N & W also argues, in a subpoint, Bailey failed to make a submissible negligence claim under FELA. To establish a submissible case under FELA, the plaintiff must show that the railroad had a duty to provide him with a reasonably safe place to work, that the railroad breached its duty of care, that this lack of due care played some part, however slight, in producing the plaintiff's injury and that the injury was reasonably foreseeable. White v. Union Pacific Railroad Company, 871 S.W.2d 50, 53 (Mo. App. E.D. 1993).

N & W argues Bailey failed to make a submissible case that: (1) his working conditions were unsafe; and, (2) the railroad

could reasonably foresee that its alleged negligence would result in his coronary artery disease.

Bailey's evidence supported a finding of unsafe conditions in N & W's sleeping facilities. The dormitory was often too noisy, too hot or too cold and too bright. These conditions coupled with an erratic work schedule contributed to Bailey's severe sleep deprivation which disrupted his circadian rhythms, ultimately causing his coronary artery disease and gastritis. N & W had actual knowledge its dormitory was substandard. Bailey's evidence clearly supported a finding that his sleeping facilities were unsafe.

The issue of foreseeability is generally a jury question. Stewart v. Alton and Southern Railway Company, 849 S.W.2d 119, 125 (Mo. App. E.D. 1993). Judicial review is limited to the reasonableness of the jury finding. Id. It is knowledge or anticipation of the possibility of harm to plaintiff, not of the exact nature of the injury, that is determinative. Id. N & W received several complaints detailing the poor conditions of the dormitory, it knew of the erratic hours Bailey worked, and it also knew of the hard labor required of brakemen. It was reasonably foreseeable that these working conditions would adversely affect periods of rest and sleep and could cause Bailey to suffer some kind of injury. Even one of N & W's experts testified that "shift work, shift variability and sleep deprivation over long periods of time endured chronically, may contribute to the formation of coronary artery disease." The same expert also conceded that information on the possible health consequences of inadequate rest has been available to the railroad industry for a long time. Bailey presented sufficient evidence to support findings of defect, causation, a reasonably foreseeable result

and physical injury. Subpoint denied.

***8** N & W argues in another subpoint that "PLAINTIFF FAILED TO MAKE A SUBMISSIBLE CASE UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT ON DEFENDANT'S ALLEGED NEGLIGENCE IN PURPORTEDLY VIOLATING THE HOURS OF SERVICE ACT BECAUSE HE IS STILL BOUND BY THE PARAMETERS OF CARLISLE."

The Hours of Service Act, 49 U.S.C. § 61 et seq. imposes many duties on railroads concerning limits on how many consecutive hours a railroad can schedule an employee for work and the quality of sleeping quarters for employees voluntarily provided by the railroad. Although there is no private right of action under the Hours of Service Act, United Transportation Union v. Lewis, 699 F.2d 1109 (11th Cir. 1983), Bailey claims he is entitled to recover under FELA because N & W's violation of the Hours of Service Act amounts to negligence per se.

"It is well-settled that the FELA requires a finding of negligence per se when there has been a violation of a safety statute specifically aimed at the railroad industry." Ries v. National R.R. Passenger Corp., 960 F.2d 1156, 1159 (3rd Cir. 1992). "The Safety Appliance, Boiler Inspection and Hours of Service Acts are all phrased in terms of "it shall be unlawful," which is the usual phrasing of a statute establishing negligence per se." Id. at 1164.

The court submitted Jury Instruction No. 13 based on Bailey's theory that N & W violated § 62(a)(3) of the Hours of Service Act. Section 62(a)(3) provides,

> (a) Limitations
> It shall be unlawful for any railroad. its officers or agents, subject to this chapter--
> . . . .
> (3) to provide sleeping quarters for employees (including crew quarters, camp or bunk cars, and trailers) which do not afford such employees an opportunity for rest, free from interruptions caused by noise under the control of the railroad, in clean, safe, and sanitary quarters; . . ..

N & W argues "even assuming arguendo that Jamie Bailey proved a violation of Section 45 U.S.C. 62(a)(3) of the Hours of Service Act so as to constitute negligence per se under the FELA . . . his claim is still bound by the limitations of Carlisle." N & W argues Capriotti controls the issue. The Capriotti court noted,

> [i]n this case, plaintiff does not seek to recover directly under the [Hours of Service Act], but seeks to recover under FELA, and thus, despite invoking the relaxed standards of proof under negligence per se, he is still bound by the FELA parameters established in Carlisle; . . . in emotional distress cases the plaintiff must prove that he was within the zone of danger.

*Capriotti, 878 F. Supp. at 434.* In our view, for the reasons previously discussed Gottshall/Carlisle does not apply. This is not an emotional distress case, nor is it a work-related-stress case. Subpoint denied.

N & W argues the trial court erred when it instructed the jury not to consider opinion testimony of a doctor who testified for N & W and offered an opinion which conflicted with his deposition testimony. The instruction was the court's remedy

for N & W's failure to alert Bailey of the surprise testimony. It assigns six reasons why this was reversible error. The trial court held:

> ***9** Dr. Geltman's deposition testimony earlier taken as a whole was to the effect . . . he did not believe that the working conditions were a significant cause of [Bailey's] heart disease, that he was unwilling to rule out categorically that it played an insignificant or insubstantial or minor role in causing [Bailey's] heart disease.
>
> The essence of his testimony in trial was that he categorically ruled out that there was even a minor or insubstantial causal relationship between the working conditions and the heart disease. . . . This was a significant change in his testimony between the deposition and the trial.

The trial court instructed the jury:

> The opinion of Dr. Edward Geltman that plaintiff Jamie Bailey's work schedule, sleep deprivation and circadian rhythm disruption, was not even an insignificant cause of Jamie Bailey's atherosclerotic heart condition, is stricken from the record and you shall not consider such evidence in arriving at your verdicts.

Obviously, the trial court concluded the expert's changed testimony was an unfair surprise.

N & W first argues the trial court erred because Dr. Geltman's opinion and testimony at trial had not changed from his deposition testimony. Dr. Geltman gave two

depositions, one in 1993 and one in 1995. In his first deposition Dr. Geltman testified that inadequate sleep, improper diet, overexertion and harassment "are relatively minor contributors to the development of various forms of heart disease. Not absolutely unrelated, but relatively minor contributors." He also testified "I cannot exclude [stress related factors] 100 percent, but I believe that it is a very minor contributor."

Near the end of his testimony in his first deposition Geltman testified:

> I believe that these various factors alleged to have been applied to Mr. Bailey by the railroad certainly are not major contributors. I did not say they had zero effect, but I also cannot say to a reasonable degree of medical certainty they had any effect. I can't say that they didn't have any effects, but I can't say to a reasonable degree of medical certainty that they contributed. (Our emphasis.)

In his second deposition Dr. Geltman testified that the association between shift work, disturbances in diurnal variation and circadian rhythm, and atherosclerosis, coronary artery disease and peptic ulcer disease is "very loose."

> I believe there is no consensus in the medical community that disturbances of circadian rhythm as occur in shift work are any kind of meaningful risk factor for coronary artery disease. Especially when compared to the standard risk factors of lipid abnormalities, hypercholesterolemia, family history, hypertension, diabetes, smoking, all the standard risk factors. Of those, if you factor in all of those, any

> effect, if any, of the shift work is trivial or very minor.

Throughout his second deposition, Dr. Geltman conceded he could not categorically rule out Bailey's work schedule and sleep disruption as a cause of his coronary artery disease or gastritis. At trial Dr. Geltman testified he did not find a causal relationship between Bailey's work schedule or the conditions of his dormitory and his heart disease. Bailey's attorney, during cross-examination, read excerpts of Dr. Geltman's deposition testimony that "any effect, if any, of the shift work is trivial or minor." He asked Dr. Geltman, "Was that your testimony?" Dr. Geltman responded, "Yes, it was." Bailey's attorney then asked, "But today you're ruling it out completely?" Dr. Geltman responded, "Yes."

***10** N & W relies on a solitary passage of Dr. Geltman's deposition testimony to argue Dr. Geltman did rule out completely Bailey's shift work as a cause of his disease. N & W relies on Dr. Geltman's testimony that "I'm not sure I would phrase it the way that nothing ever makes a difference one whit because that makes me sound insensitive. I believe that there's not a causative relationship between his shift schedule and his having had an angioplasty."

This testimony, read in isolation, eliminates the shift schedule as a cause for Bailey's angioplasty. However, shortly after giving this opinion, Dr. Geltman, clarified whether he knew if shift work over a long duration could contribute to the development of atherosclerosis. He testified, "I don't know whether or not, even though there was a statistical association, whether that was meaningful or not in terms of causation in Mr. Bailey." Throughout his deposition

testimony Geltman did not completely rule out Bailey's erratic work schedule and his inadequate sleeping dormitory as a cause of his coronary artery disease and gastritis.

The record supports a trial court finding Dr. Geltman's opinion clearly changed between the time he gave his depositions and when he testified at trial. Dr. Geltman agreed he had changed his opinion.

The trial court found: (1) Dr. Geltman's opinion had significantly changed between the depositions and trial; (2) "there was no supplementation of the deposition"; and (3) "as a consequence, . . . Rule 56 has been violated." The trial court has broad discretion in fashioning a remedy for the failure of a party to properly disclose the opinions of its experts or the factual basis for reaching their conclusions. Cremer v. Missouri Pacific Railroad Company, 811 S.W.2d 23, 25 (Mo. App. 1991).

N & W argues Rule 56.01(e)(2) applies to changes in responses to written interrogatories and not to deposition testimony. Rule 56.01(e)(2) states:

> (e) Supplementation of Responses. A party who has responded to written interrogatories with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:
>
> . . . .
>
> (2) A party is under a duty to amend a prior response seasonably if the party obtains information upon the basis of which the party knows that the response (A) was incorrect when made or (B) though correct when made is no longer true.

In Gassen v. Woy, M.D., 785 S.W.2d 601 (Mo. App. 1990), the Western District of this Court held:

> The rules make no express provision, in the case of pre-trial discovery by deposition, for an obligation to supplement responses under similar circumstances where a truthful answer when given later ceases to be correct. Considered as a whole, however, the rules and the case authority suggest that such duty is implied as a component of the discovery process.

Id. at 603. The Eastern and Southern Districts of this Court have never explicitly adopted the Woy, M.D. reasoning. See Stallings v. Washington University, 794 S.W.2d 264 (Mo. App. 1990); and Darnaby v. Sundstrom, 875 S.W.2d 195 (Mo. App. S.D. 1994).

***11** The rules relating to discovery were designed to eliminate, as far as possible, concealment and surprise in the trial of lawsuits and to provide a party with access to anything that is "relevant" to the proceedings and subject matter of the case not protected by privilege. State ex rel. Plank v. Koehr, 831 S.W.2d 926, 927 (Mo. banc 1992).

Rule 56.01(b)(4)(b) provides:

> (4)Trial Preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of Rule 56.01(b)(1) and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:
>
> . . . .
>
> (b) A party may discover by deposition the facts and

opinions to which the expert is expected to testify.

Under this rule, Bailey was entitled to discover by deposition the facts and opinions to which Dr. Geltman was expected to testify. Bailey's attorney relied on Dr. Geltman's deposition testimony that he could not categorically rule out Bailey's injuries were related to his work conditions. In his opening statement, Bailey's attorney explained to the jury that his opening statement is not evidence but "if I tell you that something's going to be in evidence, it's really my assurance or my promise to you that's what I'm going to prove and I want you to hold me to that . . . ." Later in the opening statement he spoke of the evidence saying,

> You're going to hear some contrary evidence . . . [however,] no doctor is going to look at you and say, "No, I rule out that possibility."
> What they're all going to say is okay, . . .even assuming that Jamie Bailey's work and sleep arrangement and lodging and fatigue was a factor in bringing about heart disease and ulcers, it was minimal, they're going to say it was negligible by comparison to the primary risk factors . . . .

When Dr. Geltman changed his opinion at trial and categorically ruled out Bailey's work conditions as a cause, even an insignificant cause, he gave surprising testimony. The surprise, distinguished from the nature of the revised opinion, created a possibility of prejudice which the trial court "cured" by a withdrawal instruction. To allow an expert to change

> his opinion after deposition and before trial without notice to the opposing party would frustrate the purpose of Rule 56.01(b)(4)(b). Allowing such changes in opinion after an opening statement relying on the deposition opinion, without sanction, would prevent a party from discovering by deposition the actual facts and opinions to which the expert is expected to testify. It would also run counter to the purpose of discovery rules to eliminate, as far as possible, concealment and surprise in the trial of lawsuits. State ex rel. Plank, 831 S.W.2d at 927.

We hold the trial court did not abuse its discretion when it instructed the jury to disregard Dr. Geltman's testimony "that plaintiff Jamie Bailey's work schedule, sleep deprivation and circadian rhythm disruption, was not even an insignificant cause of Jamie Bailey's atherosclerotic heart condition," because the trial testimony conflicted with plaintiff's opening statement. By so instructing, the trial court merely maintained the position of the parties during discovery and at the beginning of the trial. It also protected the integrity of the discovery process.

***12** N & W also argues the trial court gave a defective withdrawal instruction. M.A.I. 34.01 Fourth Edition provides,

34.01 [1978 Revision] Withdrawal Instructions--General Comment

> A withdrawal instruction is only to be given when during the course of the trial a false issue, improper evidence, or evidence of an abandoned issue has been injected. The purpose of a withdrawal instruction may

> be served by the court sustaining a motion to strike and admonishing the jury to disregard the evidence. However, in certain instances, the trial court may determine that such action is inadequate, inappropriate or untimely and that a written instruction is necessary.
>
> . . . .
>
> Evidence, rather than an entire issue, may also properly be withdrawn by instruction. In the event evidence, rather than an issue, is sought to be withdrawn from the jury's consideration, care must be taken that such evidence does not also concern an issue still before the jury.

N & W argues: (1) the trial court's striking of, and instructing to ignore, portions of Dr. Geltman's testimony was a "withdrawal instruction" governed by M.A.I. 34.01; (2) the "withdrawn" evidence concerned "an issue still before the jury", i.e. causation; and (3) the giving of the instruction constituted prejudicial error.

The trial court was not giving an M.A.I. 34.01 "Withdrawal Instruction." None of the stated purposes for such instruction were involved. It was merely striking testimony as a sanction for N & W's failure to comply with discovery rules. The use of a withdrawal instruction under M.A.I. 34.01 is to avoid misleading the jury on a specious issue. Bradley v. Browning-Ferris Industries, Inc., 779 S.W.2d 760, 765 (Mo. App. 1989). The purpose of the direction in this case was to protect the integrity of the discovery process, not to avoid misleading the jury on a false or abandoned issue or legally improper evidence. N & W's argument has no merit.

N & W also argues "the trial court's Instruction was so poorly

worded as to be confusing and misleading, and its prejudicial effect is demonstrated by the court's own comments regarding it." N & W calls attention to the trial court's comment, "It seems to me to be an important issue. It seems to me as an issue the case can turn on. If the jury believed your witness today, his testimony here today, the plaintiff loses." The trial court was not commenting on the instruction, it was commenting on the potential prejudicial effect of Dr. Geltman's surprise testimony. The instruction's wording was clear and targeted to the surprise testimony. In his deposition Dr. Geltman could not rule out sleep deprivation as possibly being an insignificant cause of Bailey's injuries. The instruction was a trial court remedy intended to restore the status quo ante. It was not misleading or confusing.

N & W also argues the striking of testimony was unwarranted in light of the facts reflected in the record. It argues, "[Bailey] wanted (and persuaded the Court to give him) the best of two worlds: to attempt to discredit [N & W's] key witness by confrontation and cross-examination, and then to sandbag the defense by having the Court strike Dr. Geltman's testimony and thereby destroy [N & W's] case."

***13** During his direct testimony, Dr. Geltman eliminated Bailey's shift work, circadian disruption and sleep deprivation as a cause of his coronary artery disease. Bailey, during cross-examination, obtained a concession that Dr. Geltman's direct testimony represented a change in his opinion given at deposition. The cross-examination confirmed Dr. Geltman intended to render a new opinion when he testified on direct, "there's no credible evidence to show that the conditions at the dormitory or [Bailey's] work schedule in any way contributed to his development of coronary artery disease."

(Our emphasis.) If Bailey received a dual benefit, it was deemed necessary by a failure to inform him before trial that Dr. Geltman was going to testify there was no causation. The trial court acted well within its discretion when it withdrew Geltman's surprise opinion testimony.

In its final point, N & W argues the trial court erred in refusing to give its contributory negligence instruction C. The trial court gave N & W's tendered Jury Instruction No. 10, which substantially duplicated Instruction C except it omitted the clause "or plaintiff failed to disclose to defendant that he had heart or gastrointestinal problems . . . ."

N & W argues it had adduced ample evidence of the fact that Bailey failed to inform N & W of his heart and gastritis problems. N & W offered, and the court refused, the following instruction:

> You must find plaintiff contributorily negligent if you believe:
> First, plaintiff failed to follow a low fat diet; or plaintiff failed to disclose to defendant that he had heart or gastrointestinal problems, and
> Second, plaintiff in any one or more of the respects submitted in Paragraph First, was thereby negligent, and
> Third, such negligence of plaintiff directly contributed to cause his injury.
> (Our emphasis.)

Trial courts are obligated to submit a contributory negligence instruction if there is slight proof of contributory negligence. Mateer v. Union Pacific Systems, 873 S.W.2d 239, 243 (Mo. App. E.D. 1993). In Conley v. Burlington Northern Railroad

Company, 765 S.W.2d 272 (Mo. App. 1988), we held the trial court had not erred in submitting a contributory negligence instruction where plaintiff failed to report pain resulting from continuing to work on a sprained ankle. Id. at 275. We observed,

> A layman is held to know what the experiences of daily life teach and that which is commonly understood and believed. The jury could believe that plaintiff knew or should have known that he was risking some damage to his sprained ankle by continuing to work upon the painful ankle, and that his failure to report the pain was negligence on his part--even though, as was no doubt the case, he did not realize the extent of the disability which might result, or . . . he "did not know and appreciate the gravity of the consequences."

Id. at 274. In Mateer, plaintiff brought suit under FELA for back injuries allegedly caused by repetitive traumas arising from the daily duties of his railroad work. We held the trial court properly rejected a contributory negligence instruction because it was not supported by the evidence. Mateer, 873 S.W.2d at 244. We noted all the medical authorities who had examined Mateer prior to 1987, attempted to find causation on the basis of conditions unrelated to his work. Id. "Mateer, as a layman, cannot be held to possess knowledge that performance of his duties as a lube person were causing a back problem where none of the medical authorities reached that diagnosis prior to 1987." Id. The duty to report and desist depends on employee knowledge of work related causation of injury. There was no evidence to support the finding Bailey knew or should have known N & W's sleeping facilities and his erratic work schedule were medical causes of his coronary

artery disease and gastritis.

***14** Furthermore, no evidence was presented to support a finding that Bailey's failure to disclose to N & W his coronary artery disease and gastritis directly contributed to exacerbate his medical condition. N & W defended on the basis the dormitory and work conditions did not cause disruption of sleep and circadian rhythms and did not contribute to Bailey's physical injuries. Even had Bailey known and informed N & W that his working conditions caused his heart and stomach diseases, N & W would not have made any changes in the dormitory which it knew was substandard. It has consistently refused to accept the conditions as a cause of Bailey's injuries. Point denied.

We affirm.

Mary Rhodes Russell, P.J. and Paul J. Simon, J., concur.

> FN1 Some of these cases interpret the Gottshall/Carlisle dicta as addressing duties imposed by FELA suggesting that FELA does not impose a duty on employers to maintain a stress-free work environment, even if the stress causes purely physical injuries. Other cases interpret the dicta as addressing the nature of injuries resulting from work-related-stress. These cases suggest that work-related-stress claims necessarily involve emotional injuries. The injuries are emotional, even if they involve physical manifestations, because they are caused by stress.